

OFFICE OF THE CITY ATTORNEY
OF THE CITY OF FRESNO, CALIFORNIA
HILDA CANTÚ MONTOY
City Attorney

OPINION of HILDA CANTÚ MONTOY City Attorney	No. FY 2000-1 May 30, 2000
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TO: Jeffrey M. Reid, City Manager

RE: Nature and Extent of Mayor's Executive
Powers Under Mayor - Council Form of
Government

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HILDA CANTÚ MONTOY City Attorney	May 30, 2000

TO: Jeffrey M. Reid, City Manager

RE: Nature and Extent of Mayor's Executive Powers Under Mayor - Council Form of Government

QUESTIONS PRESENTED

I

What is nature and extent of the Mayor's "executive power" in relation to the powers of the City Council?

II

Does the Mayor have any powers not enumerated in The Charter of the City of Fresno¹ by virtue of his position as the City's "Chief Executive Officer?"

III

How does the Mayor's executive power relate to the City's contracting authority?

IV

¹ The Charter of the City of Fresno is hereafter referred to generally as "The Charter" or "Charter," and specific provisions are cited as "Fresno Charter," followed by the specific section number.

When is the Mayor the “highest authorized officer” when exercising “executive powers?”

CONCLUSIONS

I

Charter § 400 provides that “[t]he executive power of the City shall be vested in the office of the Mayor.” The Charter charges the Mayor to provide for the proper and efficient administration of all affairs of the City, provide leadership in taking issues to the people, marshal public interest for municipal activity, foster a sense of cohesion among the Council, educate the public about the needs and prospects of the City, and promote economic development. Specific provisions of The Charter empower the Mayor to execute and to enforce all laws and policies, appoint, control and remove the City Manager, prepare the annual budget, exercise the power of veto, serve as liaison between the Administrative Service and the Council, recommend legislation and policy, and investigate the affairs under the Mayor’s supervision.

Executive power generally means the power to enforce and implement legislation and policy. The nature and extent of the Mayor’s executive powers are those specifically enumerated in The Charter. To the extent that the City has any executive power which The Charter does not expressly grant to the Mayor or other City official, that residual executive power lies with the Council, as the City’s governing body.

Executive authority is to be distinguished from administrative authority. The nature and extent of the Mayor’s administrative authority is as set forth in The Charter, or as necessarily implied to exercise a power expressly granted by The Charter to the Mayor. In general, the administrative authority of the City is apportioned by The Charter generally to the Council and City Manager, although certain City officials possess the administrative authority necessary to exercise power expressly apportioned to them by The Charter.

II

The great weight of authority in California and the country holds that there is no “executive authority,” “executive power,” or “administrative power” inherent in the office of Mayor. There is no evidence that The Charter was amended with the intent to vest in the Mayor powers not specified in The Charter. While there may be certain administrative authority necessarily implied to exercise a certain power, the implied authority or power relates to the exercise of the power granted, not to the office to which the power is granted. Stated otherwise, if the law implies any authority in an official other than the governing body, the implied authority follows the power, not the official to whom The Charter assigns the power. Additionally, to the extent administrative authority is implied, it is secondary and subordinate to expressly granted powers. Therefore, under Fresno’s Mayor-Council form of government, the Mayor has

no inherent or common law powers beyond those powers specifically prescribed by Charter.

III

The Mayor's executive power as it relates to the City's contracting authority under The Charter is as follows: to recommend to the Council contracts in furtherance of the Mayor's economic and legislative initiatives; to veto contracts containing legislative proposals or appropriating funds; and to see that the City Manager implements the provisions of adopted contracts. The Council by ordinance and resolution has delegated limited contracting authority to the City Manager and other City officials.

IV

The Mayor is the "highest" executive officer when The Charter empowers the Mayor to perform a particular executive act solely and exclusively.

SUMMARY CONCLUSION

In this Opinion, we respond to a request by the City Manager for a "survey of the field of law governing the limits of [the Mayor's] Executive Powers."² It is practically impossible to survey the law relating to municipal executive power, as requested, because relatively little has been written concerning it. Because Fresno has a unique form of government, such legal authority as is available is of general assistance only. Nevertheless, we are able to identify the breadth and nature of the

² See, Attachment 1: City Manager Memorandum to City Attorney, et al, Re: Executive Authorities of the Mayor, p. 1 (August 3, 1999). The City Manager states:

The Charter expressly states that "The executive power of the City shall be vested in the office of the Mayor." I believe we would benefit from a memorandum that includes a survey of relevant law that explains what constitutes "Executive Powers" as referenced in the first sentence of Charter § 400. The grant of executive powers to the Mayor carries with it, by implication, limitation on the Council authorities. Specifically, those authorities that constitute an executive power would be included in the exceptions to general Council authorities stated in the first sentence of § 500. The legal analysis forwarded from your office does not address that general grant of authorities to the Mayor. The opinions instead focus on the provisions that details specific authorities of the Mayor or conclusions regarding the general authorities reserved on behalf of the Council. You have, however, determined certain implicit authorities for the Mayor concerning Executive Orders.

We address the City Manager's request again in Section P ("Epilogue"), below.

Mayor's executive power by close examination of the relevant Charter provisions, by careful analogy to related principles at the state and federal levels, by review of case law, and by review of legal treatises on municipal government.

The municipal executive power of the City is generally apportioned between the Council and the Mayor. To a lesser degree, certain municipal executive power is also apportioned to the City Manager, other Charter officers, and certain City officials. Municipal executive power is almost always specific and expressed.

The term "executive power" at the level of city government does not mean the same thing that "Executive Power" means at the level of state and federal government where sovereign governments are involved. The words "executive power" at the level of local government describe the right of a city agent (though not necessarily a city official or the city's chief executive) to enforce or carry out law and policy for the performance of a local governmental or proprietary function, by exercising an expressly granted power. The term "Executive Power" at the level of state and federal government relates to the power of the highest (chief) executive official to enforce or execute the law and implement policy by exercising the sovereign powers apportioned to the Executive Branch, following the "separation of powers" doctrine.

The administrative authority of the City is distinct from executive power. Municipal administrative power can be expressed, but it is usually implied as necessary to carry out an expressed power.

Some key principles emerge from our broad survey of municipal authority. A survey or catalog type discussion is time intensive and yields little analysis of practical value. An analysis considering a concrete set of facts or circumstances is necessary to yield a meaningful discussion. In other words, this opinion does not exhaustively address every potential scenario. Each power must be examined on a case-by-case basis against the texture of related Charter provisions, addressing a specific objective sought to be achieved by its exercise in a given situation.

The Mayor is authorized to fully exercise those powers expressly delegated by The Charter or other source authority to his office,³ so long as the Mayor does not impair the functions or impede the powers of the Council.⁴ The Council cannot exercise its power in a manner that is inconsistent with The Charter limitations, directly interferes with the

³ *Lukens v. Nye*, 156 Cal. 498 (1909).

⁴ See generally, *Harbor v. Deukmejian*, 43 Cal. 3d 1078 (1987).

Administrative Service,⁵ or impairs the express powers of the Mayor.⁶ Neither the Council, Mayor, nor other City official may exercise any power in such a way as to impair The Charter function of other City officials.⁷

Just as it is the primary function of municipal legal analysis to harmonize ambiguous or inconsistent Charter provisions relating to the same power so as to avoid declaring a conflict of municipal authority, so The Charter contemplates that the Mayor, City Manager, and Council will work “cohesively” and give effect to each others’ exercise of power so as to avoid unnecessary conflicts and clashes of authority. Potential conflicts can be anticipated and avoided through the Mayor’s exercise of broad leadership authority, the Mayor’s power to supervise the City Manager, and the Council’s obligation to consider and to respond to the Mayor’s legislative and policy initiatives. In this fashion, The Charter contemplates that the Mayor, Council, and City Manager will form a consensus through ordinances, resolutions, and executive orders in which they apportion among themselves the authority to perform closely-related functions as needed to move the City, as a whole, toward common objectives.

ANALYSIS

A. Introduction.

1. Overview.

At the outset, we note that this subject matter has been extensively addressed in (i) Opinion of the City Attorney No. FY 98-1, March 6, 1998 relating to governance under the Mayor-Council form of government and in (ii) Opinion of the City Attorney No. FY 99-1, February 25, 1999 relating in pertinent part to refusal of City officials to perform duties and City remedies thereon. We understand the request for legal opinion as one for amplification of our previous advice by addressing the specific nature and

⁵ Fresno Charter § 706.

⁶ Opn. City Atty. No. FY 98-1, p. 10 (March 6, 1998); See, *Harbor v. Deukmejian*, 43 Cal. 3d 1078 (1987). As we explain in Section N, analogies to other forms of government (especially state government) must be carefully drawn. Nevertheless, it is appropriate to rely upon precedent interpreting the extent to which a public body or official may exercise a particular power, such as the veto, which is analogous to a power conferred under our own form of government.

⁷ See generally, Opn. City Atty. No. FY 96-3, pp. 3-4 (December 20, 1996).

extent of the Mayor's executive powers in relation to the powers of the Council.⁸ Preparing a response to these questions has been both research and time intensive.⁹

Having surveyed the law within and without California, we can ascertain the operative effect of The Charter provisions referring to and identifying the executive power of the Mayor. The Charter provision – “[t]he executive power of the City shall be vested in the office of the Mayor”-- is the phrase commonly employed to institute the Mayor as the City's principal executive officer. The words in The Charter which make the Mayor responsible for the oversight of the proper and efficient administration of the City's affairs, leadership, etc, constitute his duty or charge. The Charter provisions specifically authorizing the Mayor to execute and enforce all laws and policies, appoint and control the City Manager, investigate certain affairs, etc., enumerate the Mayor's executive powers.

The great weight of authority in California and throughout the country holds that generally the powers of a city are exercised by its governing body (i.e., its city council). Therefore, where a charter such as Fresno's specifies certain power in the mayor or city manager, that power is a “limitation” on power the city council would otherwise possess.¹⁰ As we will explain, the power conferred by charter upon an executive officer is interpreted narrowly, since it is an exception to the general power that the city council would ordinarily possess.

The potential sources of mayoral power are the California Constitution, state statutes, and The Charter.¹¹ The few California statutes which address the Mayor's authority govern general law– not charter– cities.¹² Fresno is a charter city deriving its

⁸ Executive power should not be confused with administrative power. See, § A 2 below (Definition of terms, etc.) and § K below (Administrative Duties of the Mayor).

⁹ *“Whoso desireth to discourse in a proper manner concerning corporated towns and communities must take in a great variety of matter and should be allowed a great deal of time and preparation . . . The subject is extensive and difficult.”* Attributed to: THOMAS MADDOX, HISTORICAL ESSAY CONCERNING THE CITIES, TOWNS AND BOROUGHES OF ENGLAND, Taken from Records (William Boyer, London, 1726), in CHARLES S. RHYNE, THE LAW OF LOCAL GOVERNMENT OPERATIONS PROJECT, THE LAW OF LOCAL GOVERNMENT OPERATIONS, § 1.1, p. 1 (1980) (hereafter, “RHYNE, LOCAL GOV'T OPER'S.”).

¹⁰ *Belli v. Board of Supervisors of San Francisco*, 123 Cal. App. 44 (1932); See generally, CHARLES S. RHYNE, Mayor: Chief MUNICIPAL EXECUTIVE Law (hereafter, “RHYNE, MUNICIPAL EXECUTIVE”), § 10.1, pp. 50-51 and §§15.13- 15.15, pp. 138-143 (veto is legislative; veto power does not exist unless expressly granted, and to be exercised only when and to the extent granted; thus veto power “cannot be enlarged by construction”).

¹¹ Fresno Charter §§ 100 and 200.

¹² See, Cal. Gov't Code §§ 34900 through 34904, and 40601 through 40605 (on election and powers of (continued...))

municipal power by grant of the California Constitution,¹³ as may be limited by The Charter. The State Constitution neither requires a charter city to have a mayor, nor requires that executive power be apportioned to the chief executive of a charter city in a particular way.¹⁴ Therefore, the specific provisions of Fresno's Charter constitute the sum total of the law defining the City's municipal executive authority. The Charter also defines how the executive authority of the City is apportioned between the Mayor and the Council.

Our analysis devotes significant discussion to the concept of executive powers and executive authority revolving around a single individual or department, as recognized in state and federal law. Some tend to confuse the authority of the Mayor or City Manager with the "executive authority" and "executive power" of a chief executive in the American form of government based on the "separation of powers" doctrine featuring separate "branches" of government and "checks and balances. The separation of powers doctrine, however, is inapplicable to cities. The doctrine applies to "sovereigns," which have the right of full and complete self- governance.¹⁵ In California, a charter city may adopt a form of government using a limited or no method of checks and balances.

2. Definition of terms and concepts used in this opinion.

a. "administrative power"– As used in this discussion, the power to administer and manage the municipality and its operations, such as hiring, firing, and controlling staff, managing facilities and other property and resources, and making contracts.¹⁶ Sometimes used synonymously with "executive power."¹⁷

b. "governing body"– The body of officials that collectively acts as principal and agent of the municipality, and exercises the general powers of the municipality. The governing body exercises all legislative, executive, and administrative

¹²(...continued)
mayor in general law cities).

¹³ CAL. CONST. ART. 11, § 3(a) (authorizing home rule cities) .

¹⁴ See, for example, *Rees v. Layton*, 6 Cal. App. 3d 815 (1970) (selection of municipal officers in charter cities is matter of local concern controlled by charter, not general law).

¹⁵ See, for example, *Heath v. Alabama*, 474 U.S. 82 (1985) (sovereign power of the States [to prosecute crimes] as derived from "separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved by the Tenth Amendment"; municipalities not sovereign if their authority derives from "the same organic law that empower the State to prosecute").

¹⁶ See generally, RHYNE, MUNICIPAL EXECUTIVE, Chapter 11 "Executive and Administrative Powers."

¹⁷ 2A McQUILLIN, MUN. CORP., § 10.06, p. 311.

authority not otherwise specifically apportioned or delegated to other officials of the municipality.¹⁸

c. “legislative power”– Generally, the power of the governing body to make laws and establish policies governing municipal affairs within its jurisdiction (territorial limits). It also includes power to adopt budgets, propose laws and policies; the power of an official to veto specified legislation.¹⁹

d. “municipal (chief) executive”– The highest official expressly authorized by state or local law to execute the laws and policies of the city; commonly the mayor or city manager.²⁰

e. “municipal corporation (principal and agent)”– In California, a municipal corporation is usually a charter city (as opposed to a non-chartered, general law city). Members of the governing body are the agents of the electorate and collectively act as the principal of the corporation.²¹

f. “municipal executive power”– That particular power which happens to be given by state constitution, state statute, city charter or local ordinance to the executive of a particular municipality. The term has no general definition or constant set of attributes, other than the power to enforce the policies and laws of the municipality and/or appoint the agents charged with such enforcement.²²

g. “municipality”– The primary entity providing local governmental functions and services, and authorized to perform proprietary functions, usually a town or city. Related terms: municipal corporation and local government, referring or pertaining to city government.²³

¹⁸ RHYNE, LOCAL GOV'T OPER'S., § 5.2, p. 72.

¹⁹ 2A McQUILLIN, MUN. CORP., § 10.06, p. 311.

²⁰ RHYNE, MUNICIPAL EXECUTIVE, § 10.1, pp. 48-49.

²¹ RHYNE, LOCAL GOV'T OPER'S., § 5.2, p. 72.

²² 2A McQUILLIN, MUNICIPAL CORPORATIONS (3rd ed.) (hereafter, “McQUILLIN, MUN. CORP.”), § 10.06, p. 311 (legislative and executive powers); DAVID J. MCCARTHY, JR., LOCAL GOVERNMENT LAW (Nutshell Series) (3rd ed.), p. 129 (“The local executive possesses only such powers as are conferred by statute or charter”); RHYNE, MUNICIPAL EXECUTIVE, § 10.1, pp. 50-51.

²³ WILLIAM D. VALENTE & DAVID J. MCCARTHY, JR., LOCAL GOVERNMENT LAW, CASES AND MATERIALS (4th ed.), p. 6; RHYNE, LOCAL GOV'T OPER'S., pp. 2 and 6.

h. “separation of powers”– A division of governmental authority exercised by the sovereign to preclude, at that level of governance, abuses by one branch over another.²⁴

B. The Charter is the City’s Constitution.

The Charter operates as the City’s constitution.²⁵ It defines the powers and duties of the Council, Mayor, and other City Officials, and the relative relationships and limits of those powers when interacting as a total system of local government.²⁶ It has been stated that the purpose of a charter is to “express the powers of the corporation and allocate the functions therein.”²⁷

1. Limited authority is available to interpret the allocation of powers in The Charter.

Local government assumes many forms in the several states. The structure of government in most cities and towns is an adaptation of either the mayor-council, commission, or city manager plans. The mayor-council form of government usually falls into either a strong-mayor or weak-mayor system. This diversity leads to lack of a “systematic arrangement of functions and classification of powers or controlling principles of municipal organization.”²⁸

²⁴ Only the state and federal governments are sovereigns. “It should also be noted that the United States Supreme Court has held that there is no place in the federal system for sovereign cities, largely on federalism grounds.” 2 MCQUILLIN, MUN. CORP., § 4.82, pp. 178-179. See also, RHYNE, LOCAL GOV’T OPER’S., § 3.3, pp. 50-51.

²⁵ *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 170 (1994) (supreme law of the city, subject to conflicting provisions of state and federal Constitutions and preemptive state or federal law); Opn. City Atty. No. 98-1, p. 2 (March 6, 1998); See, RHYNE, LOCAL GOV’T OPER’S., § 3.2, p. 48 describing charter “as the ‘organic law’ of the municipality, as being analogous to the constitution of a higher sovereign, and as the paramount law of the municipal corporation, which governs and controls the municipal corporation much the same as the state constitution governs and controls the state legislature.”

²⁶ Opn. City Atty. No. FY 98-1, p. 2 (March 6, 1998).

²⁷ MCCARTHY, JR., LOCAL GOVERNMENT LAW (3rd ed.), § 3, page 20.

²⁸ 2A MCQUILLIN, MUN. CORP., § 9.12, p. 198: “In the various jurisdictions there are multitudinous forms of municipal organization, and the structure and function of cities and towns greatly vary in the same state. This is due in part to the difference in population requiring different community needs, conveniences and comforts; in part to lack of uniformity of opinion as to what service the local organ should furnish its inhabitants; and in part, to the grants of power by the legislature from time to time in issuing and amending charters, and to the variety of forms and powers of

(continued...)

City charters can deal with a wide variety of subjects. Charters can differ widely between cities in the same state, and between cities of different states. The more unique a charter is, the less judicial precedent that is available to guide its interpretation. The subjects that may be lawfully and properly treated in home rule charters are diverse and numerous. As has been stated:

Thus, judicial opinions and decisions in one state may be of little relevance or value elsewhere. Accordingly the decisions in regard to powers of home rule municipalities in the particular state are of the greatest importance, as evidenced by decisions of the courts in California . . . and other states in which municipalities are authorized to adopt home rule charters.²⁹

Under some forms of local government, “certain, if not all executive and legislative powers are granted mutually to the mayor and municipal legislature.”³⁰ In some jurisdictions, the mayor may even exercise judicial powers.³¹

Limited legal authority is available that expressly addresses the respective powers of the Mayor and Council under a charter such as Fresno’s Charter. In our various opinions analyzing the City of Fresno Mayor-Council form of government, we have drawn

²⁸(...continued)

constitutional, legislative and optional charters. The consequence is that there is no systematic arrangement of functions and classification of powers or controlling principles of municipal organization.”

²⁹ 2A McQUILLIN, MUN. CORP., § 10.16, p. 353 (citing the following California cases: *Rivera v. Fresno*, 6 Cal. 3d 132 (1971); *Bishop v. San Jose*, 1 Cal. 3d 56 (1969); *In re Hubbard*, 62 Cal. 2d 119 (1964) (limitations as to subject matters covered or partially covered by general law); *City of Grass Valley v. Walkinshaw*, 34 Cal. 2d 595 (1949); *Smith v. City of Riverside*, 34 Cal. App. 3d 529 (1973); *Ruane v. City of San Diego*, 267 Cal. App. 2d 548 (1968); *People v. Butler*, 252 Cal. App. 2d Supp. 1053 (1967); *Redwood City v. Moore*, 231 Cal. App. 2d 563 (1965); and *Bayless v. Limber*, 26 Cal. App. 3d 463 (1972).

³⁰ RHYNE, MUNICIPAL EXECUTIVE, § 10.5, p. 64 [footnotes omitted] (citing *In Re Dunscomb* 58 Cal. App. 610, 613 (1922)).

³¹ RHYNE, MUNICIPAL EXECUTIVE, § 10.1, p. 49 (“It has been held that the mayor’s exercise of both executive and judicial powers does not violate the separation of powers doctrine, because, as detailed in the noted case, the state constitutional provision codifying the doctrine applied only to state, and not municipal officers. Another court reached the same result through the application of a blanket rule that the doctrine does not apply to municipal officers” [footnotes omitted]).

narrow and careful analogies to the federal model of separation of powers and to the state governor - chief executive model.³²

In order to structure city government following a separation of powers model, there must be evidence that the electorate amended its charter with that intent. That intent would have been carried out by Charter provisions dividing the City's powers into executive, legislative and judicial branches, incorporating the system of so-called checks and balances "in like manner as the national and state governments," and "creating independent departments," under an arrangement referred to as "the federal plan."³³ As will be noted below, the legislative history establishes a very weak separation of powers model without the necessary intent and without the necessary statutory language to establish a model akin to either the federal or state models.

The division of legislative and executive functions varies with the degree of strength vested in the office of the mayor. If The Charter had vested all executive and administrative power in the Mayor, then Fresno would have a true strong mayor plan.³⁴ The enumeration of the Mayor's powers and duties in The Charter could have, but did

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³² See, Opn. City Atty. No. FY 98-1, p. 10 (March 6, 1998) (citing cases which qualify the use of the doctrine as to cities); see also, City Attorney Memorandum to Council Re: City Manager's Duty to Attend Council Meetings, p. 3 (October 26, 1998) (discussing separation of powers by cautious analogy to state constitution).

³³ 2A McQUILLIN, MUN. CORP., § 9.12, p. 198: "A rough classification of form of organization (each class presenting characteristic features) would include (1) the mayor-and-council, or what is commonly called the aldermanic or councilmanic; (2) the autocratic mayor as the chief power in city government with council having little real authority; (3) the commission plan; (4) (a slight modification of the last) the city or commission-manager plan; (5) division of powers into executive, legislative and judicial, incorporating the system of so-called checks and balances in like manner as the national and state governments and creating independent departments, often mentioned as "the federal plan"; and (6) when executive or administrative powers are exercised by various departments or boards it is sometimes called "the board system."

³⁴ RHYNE, LOCAL GOV'T OPER'S., § 1.6, p. 7.

not, in effect,³⁵ give the Mayor all the City's administrative or executive power,³⁶ and The Charter does not prescribe a "federal plan" form of government.³⁷

Cities and towns differ considerably within the United States, as do their forms of government, even within the same state.³⁸ Fresno has a variation of the mayor-council form of government, which we have described as a "hybrid" form of government.³⁹ One commentator agrees, noting as follows:

Sometimes new forms of local government are developed that may be considered hybrids—combinations of the desirable features of two or more traditional types. For instance, there are often attempts to combine some of the elements of the strong mayor-council system with the city manager plan. Under such a hybrid system, the manager may be appointed by the mayor, or at least be directly responsible to him. The mayor thus retains considerable power, but the manager exercises day-to-day supervisory authority over some or all of the city departments.⁴⁰

We found no precedential decisions evaluating our form of government. Therefore, to analyze the City's executive power, we rely on plain language in The Charter, on the legislative history relating to the Mayor-Council form of government, on our previous opinions, and on general legal principles of municipal law

³⁵ 2A McQUILLIN, MUN. CORP., § 9.09, p. 191: "however, in many instances, the separation of powers was not complete, since the council performed many duties not of a legislative character. Sometimes the mayor possessed the power of veto, and in such case the office assumed more dignity and importance."

³⁶ S. STEVENSON, ANTIEAU ON LOCAL GOVERNMENT LAW, § 76.03 (2d ed.); RHYNE, LOCAL GOV'T OPER'S., § 5.3, pp. 73-74.

³⁷ 2A McQUILLIN, MUN. CORP., § 9.09, p. 190: "Thus it [separation of powers] has been held inapplicable to municipal and local officers, notwithstanding it adheres in state government. Principles regarding separation of governmental departments do not provide that administrative or executive departments may not act in conjunction with the legislative department if it so expressly stated in the constitution or charter of the political unit." [Footnote omitted.]

³⁸ OSBORNE REYNOLDS, LOCAL GOVERNMENT LAW, § 22, p. 56 (1982) (Hornbook Series) (hereafter REYNOLDS, LOCAL GOVERNMENT LAW).

³⁹ See, City Attorney, Mayor-Council Form of Government Summary and Transition Recommendations, p. 5 (June 7, 1996).

⁴⁰ REYNOLDS, LOCAL GOVERNMENT LAW, § 22, p. 57.

C. Legislative History for Mayor - Council form of government.

1. Legislative intent is paramount in interpreting the City's Charter.

The Charter must be interpreted to effectuate the intent of its framers and the voters who adopted it. While The Charter is the determinative authority on powers under the Mayor-Council form of government, it contains gaps and inconsistencies.

In analyzing the City's Charter, we are bound by opinions of the California Supreme Court on principles of statutory and constitutional construction. As the California Supreme Court has enunciated:

It is a cardinal rule of construction that words or phrases are not to be viewed in isolation; instead, each is to be read in the context of the other provisions of the Constitution bearing on the same subject. The goal, of course, is to harmonize all related provisions if it is reasonably possible to do so without distorting their apparent meaning, and in so doing to give effect to the scheme as a whole. Strained interpretation, or construction leading to unreasonable or impractical results, is to be avoided.⁴¹

2. Legislative intent concerning Executive Powers.

a. Charter Review Committee:⁴² The "Charter Review Committee Report to the City of Fresno" issued on November 3, 1992 ("CRC Report") recommended a change in the Council-City Manager form of government to a "Strong Mayor form of government" for particular reasons. The recommendation for Item 3 to implement this new form of government, under "The Mayor," stated, "The Mayor would be recognized as the executive head of City government."

The CRC Report did not define the word "executive" when referring to the Mayor's role. However, it did explain what it meant. As concerns the Mayor's new powers, the CRC Report articulated these reasons: developing a city vision with the Council, initiate

⁴¹ *Fields v. Eu*, 18 Cal. 3d 322, 328, (1976) [citations omitted].

⁴² The goals of the Charter Review Committee ("Committee") which proposed the new form of government were: (a) to address problems associated with a dysfunctional Council by adding authority to the role of the Mayor, whose primary function is to advance legislative proposals which are propelled by a vision for the future; (b) to retain the Council's role as governing body except insofar as it becomes more of a reactive body to the Mayor's proposals; and (c) to retain a semblance of the City Manager type of government, administered by a "professional manager," free of "political" interference.

legislative action subject to Council approval, set agendas, and veto specified legislation, subject to Council override.⁴³

The Recommendations contained in the CRC Report intended that the Council have “checks and balances” over the Mayor’s new powers. The Mayor was not to receive increased power over City administrative affairs, which were to continue being managed by a “professional City Manager.” By recommending the retention of a professional City Manager, the Committee was concerned that the City Manager keep “the traditional responsibilities of a professional City Manager.” In other words, it was the Committee’s intent that the City Manager retain the power to:

. . . ensure that The Charter and Ordinances are enforced, exercise control over all departments, appoint all department heads, assist the Mayor in preparing the budget, establish financial and accounting records, establish a central purchasing system, advise the Mayor of the City’s financial affairs, and perform such other duties as prescribed by The Charter or required of him/her by the Mayor. It is important that the City Manager retain these traditional duties so that the City may continue to be well-managed in an efficient and productive manner.⁴⁴

The position of City Manager was to retain all the powers the position held before the Mayor-Council form of government. In keeping with this recommendation, the provisions of Charter § 706, which prohibit the Mayor and Council, except by official action taken in policy matters, from interfering with the execution of the City Manager’s powers and duties, were retained.⁴⁵

⁴³ The CRC Report reads: “Fresno’s past record indicates that the average Manager’s tenure is three years, which does not give rise to the opportunity to develop a common ‘Vision’ with the Council. ¶The Committee feels that the Mayor, as the single official elected citywide, must be given the authority to compel legislative action and to subdue, by veto, any action conceived which has as its results the denigration of effective governance. The Mayor should be considered not only as a presiding officer and ceremonial officer, but as the leader in setting agendas. Local governance must rely upon a popularly elected Mayor; authority to perform must be provided and power to initiate action must be included.”

⁴⁴ CRC Report p. 2.

⁴⁵ The CRC Report states: “The Committee strongly recommends that the City amend its charter to adopt a Strong mayor form of government only as along as specific checks and balances delineated below are given to the Council. The Strong Mayor form of government suggested herein is not meant to be synonymous with conjured images many have of big city politics in the East, which are associated with corruption and patronage. Rather, the Strong Mayor form we

(continued...)

b. City Council: The Council⁴⁶ received and reviewed the CRC Report. The Council called for further hearings. During the public proceedings leading to the approval of the final language which was eventually submitted to the electorate, the Council did not define the term executive powers. Instead, the Council approved individual, expressed powers to be ascribed to the office of Mayor. The Council adopted many of the specific powers which the CRC Report recommended for the Mayor, but also disapproved or curtailed others. For example, the Council disapproved the power to hire and fire the City Clerk and City Attorney, and curtailed the Mayor's universal veto power over all legislation.

As we have stated in previous opinions,⁴⁷ the goals of the Committee were reviewed by the Council at the time and translated into a set of precepts which were incorporated into the amended Charter and submitted to the voters for approval.⁴⁸

c. City Attorney Impartial Analysis: The Impartial Analysis of the proposed Charter amendments prepared by the City Attorney's Office repeated the statement that the Mayor would become the chief executive officer of the City, and then listed the duties and responsibilities. We were unable to locate any legislative material showing that by using the term "executive authority," there was an intent to confer any

⁴⁵(...continued)

recommend allows the Mayor to articulate a vision, to have a professional manager to help implement the vision, and a City Council vested with certain powers to hold the Mayor's increased powers in check." Indeed, the CRC Report alone reiterates the recommendation for a professional City Manager in different discussions: "Rather, the Strong Mayor form [of government] we recommend allows the Mayor . . . to have a professional manager to help implement the vision;" "[a] professional City Manager would directly supervise all operations of City departments;" and "[t]he City Manager would be a professional, pursuant to the same qualifications of a City Manager now contained in § 701 of The Charter." *Id.* at pp. 2-3. See also, City Attorney Impartial Analysis (describing current city manager as "professional manager"); See, City of Fresno Mayor's Transition Team Preliminary Report (December 24, 1996) ("The City Manager maintains the traditional role held as the direct professional manager of the administrative service").

⁴⁶ Including the Mayor under the former governing structure.

⁴⁷ See, e.g., *Opn. City Atty. No. FY 98-1*, pp. 3-4 (March 6, 1998).

⁴⁸ As concerns the proposed executive and administrative power, these precepts provide that: (a) The City Council will function as the governing body largely as it did before. Additionally, Council will respond and react to Mayoral proposals and a Mayor-prepared budget. The Council "checks" the Mayor's power, possessing the power to decline the Mayor's proposals, disapprove or modify the Mayor's City budget, and override mayoral vetoes. (b) The Mayor is the titular head of the City government, formulates a vision for the City, develops legislative proposals and an annual budget, forwards legislative proposals and the budget to the Council for action, and vetoes legislation. (c) The Mayor hires and supervises the professional City Manager, but cannot direct the City Manager in ways that frustrates the authority or mission of the Council, or dictate how the City Manager administers his staff.

authority upon the Mayor beyond that listed in The Charter amendments and repeated in the Impartial Analysis.⁴⁹

D. Executive powers of the Mayor.

1. The Mayor's powers and duties are those expressed in The Charter.

Charter § 400 provides, in part:

SECTION 400. Powers and Duties. The executive power of the City shall be vested in the office of Mayor. . . . The Mayor shall be the Chief Executive Officer of the City, responsible for.
...

The opening sentence of Charter § 400 designates the Mayor as the “office” which is to exercise unspecified “executive power.” The subsequent sentence identifies the Mayor as the City’s chief executive. A cursory reading of these provisions may lead one to inquire, should these provisions be interpreted broadly? Should they be read standing alone? What is the effect of the enumeration of specific powers and duties following the above-quoted provisions?

2. The provisions of Charter § 400 vesting “the executive power of the City” in the office of Mayor are terms of art with a prescribed meaning and intent.

The language quoted is commonly used to designate a city’s principal executive officer, regardless of the level of executive authority granted. As the leading municipal law treatise observes:

Universally, the mayor is the chief executive officer of the city and, except as otherwise provided, charters nearly always

⁴⁹ The Impartial Analysis reads: “The Mayor would become the Chief Executive Officer of the City and would no longer sit as a member of the Council. The Mayor would hire and fire the Chief Administrative Officer (currently known as the City Manager). Preparation of the budget would be the responsibility of the Mayor and require approval of the Council. The veto power of the Mayor would apply to legislative acts of the Council. Exceptions to the veto authority would include emergency actions, rezoning actions, community plan amendments, specific plan amendments, and general plan amendments. Vetoed items could be overridden with five votes of the Council. Finally, the Mayor would propose legislation and act as liaison between the Council and staff.”

declare that he or she shall have and exercise all the executive powers of the municipality.⁵⁰

McQuillin notes that the mayor is not always the chief executive or head of a municipal corporation, and cites instances in other jurisdictions where the principal executive can be the president recorder, chairman, city manager, etc.⁵¹ City charters “usually confer . . . all executive powers of the municipality” upon the Mayor as a means of designating the incumbent of that office as “the chief executive officer of the municipality.”⁵² Under Fresno’s Mayor-Council form of government, the City Manager retains most of the administrative authority, and a significant level of executive authority, and was intended to continue to function as a professional city manager, much as before. Therefore, the first sentence of Charter § 400 is a common method of clearly designating the Mayor as the City’s chief executive, and not the City Manager, Council President, or other official who may be also authorized to take some executive or administrative action on behalf of the City.⁵³

3. A Mayor in a California charter city has been found to exercise only those corporate powers “distinctly conferred.”

In *In Re Dunscomb*,⁵⁴ the City of Berkeley ordered ballots printed from the “Berkeley Gazette,” a corporation of which the respondents were officers, without specifying price. After the work was performed and the Council approved payment of a bill, the petitioner, mayor of Berkeley, heard that the charge was excessive, and issued a

⁵⁰ 3 McQUILLIN, MUN. CORP., § 12.43, p. 249 (observing also that the mayor or other chief executive’s powers and duties “rest almost entirely upon the proper construction of the charter and ordinances or bylaws and municipal regulations . . .”).

⁵¹ 3 McQUILLIN, MUN. CORP., § 12.43, p. 251.

⁵² RHYNE, LOCAL GOV’T OPER’G., § 13.70, p. 310. See, *Dieringer v. Bachman*, 131 W. Va. 562, 563-564 (1948) (determining that as between mayor and city manager, city manager is the executive authorized to appoint firemen’s civil service commission member, where statute provides for appointment by “mayor or principal executive officer of the municipality;” “the word ‘mayor’ is added merely to designate the title to which the principal executive officer usually bears in cities throughout this State”).

⁵³ RHYNE, MUNICIPAL EXECUTIVE, § 10.1, p. 48 (mayor is usually chief executive officer, except under some city manager forms of government).

⁵⁴ 58 Cal. App. 610 (1922).

subpoena to respondents to testify before him and produce evidence that the bill was reasonable.⁵⁵

Respondents failed to obey the subpoena and the Berkeley Mayor applied to the Alameda County Superior Court for an order to show cause why respondents refused to do so. The trial court sustained demurrers (i.e., agreed with legal challenges to the mayor's right to bring the action), and the mayor appealed. The main question for the appellate court was whether or not the mayor had the legal authority or power "to investigate the bill in question, and to this end require respondents to produce papers and documents and appear before him in obedience to his subpoena."⁵⁶ In answering this question, the court observed:

The source of the powers and duties of the mayor is the charter of the municipality. In the various chapters of that instrument are to be found the provisions for his appointment and an enumeration of his powers and duties. He is one of ten elective officials. As chief executive he must see that all ordinances are duly enforced, . . . and directed to ascertain whether all contracts made with the city are faithfully performed, and he must annually, and from time to time, give the council information relative to the affairs of the city and recommend to its consideration such matters as he may deem expedient. He is given the power to make an examination of the books of officials and employees, and has supervision over public utility companies, and he performs such other powers and duties as may be prescribed by law and ordinance. . . . The council is made the governing body of the municipality subject to the express limitations of the charter; is vested with all powers of legislation in municipal affairs adequate to a complete system of local government consistent with the constitution of the state. . . . It thus appears that the functions of the mayor, as such, are intended in the main to be, and they are, of an executive or administrative character, but whatever power he may at any time exercise, be it executive, legislative, or judicial, it must be warranted or authorized or be necessarily implied, or his acts will be deemed illegal and a

⁵⁵ 58 Cal. App. at 611.

⁵⁶ 58 Cal. App. at 611.

usurpation of authority. (*Von Schmidt v. Widber*, 105 Cal. 151
[38 Pac. 682].) [Emphasis added.]⁵⁷

The Berkeley Mayor pointed out to the appellate court that Berkeley had amended the Berkeley City Charter, consistent with the provisions of section 6 of article

⁵⁷ 58 Cal. App. at 611-612.

XI of the State Constitution (giving to cities the right and power to make and enforce all laws and regulations in respect to municipal affairs). The mayor claimed that by reason of this charter amendment, the Berkeley Charter instead of being a grant of power,

became in effect a limitation of powers, and that the mayor, in carrying out his official duties, has therefore complete authority to investigate any matter relating to municipal affairs unless prohibited from so doing by direct limitation.⁵⁸

The appellate court found it unnecessary to address the charter amendment. The appellate court explained:

By the charter amendment (sec. 115, art. XVI) the city is given the right to make and enforce laws, subject to the limitations and restrictions provided for in the charter. By that instrument the powers and duties of the mayor are restricted. The council is invested with the legislative powers of the municipality, and is its governing body. True, the mayor is a member thereof, and as such he has the same, but no greater, power than any of the other members, and that body must function as a whole and not by its members separately. The authority of each official, board, or department of the municipality to exercise any corporate powers with which it has been clothed must be distinctly conferred or necessarily implied, in order to entitle it to act. ¶ The fact that the mayor, as chief executive, is given power to see that all ordinances are faithfully observed does not confer the authority here attempted to be exercised. Whatever power he has to object to the correctness of a charge of the character here involved must be exercised in conjunction with all the other members of the council. The question of the reasonableness of a demand is not one for the mayor as such to determine. Any other conclusion would totally distort the plain intention of the framers of the charter and stultify and destroy the limitations sought to be placed upon the various boards and officers.⁵⁹ [Emphasis added.]

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⁵⁸ 58 Cal. App. at 612-613 (footnotes omitted).

⁵⁹ 58 Cal. App. at 613-614.

The appellate court upheld the trial judge decision to dismiss the Berkeley Mayor's challenge, because the mayor did not have authority to subpoena documents to confirm the reasonableness of the bill.⁶⁰

4. No executive powers are to be implied from general references to “the executive power” or to the title of “chief executive.”

Even in the law interpreting the broad powers of the President as the Chief Executive of the federal government, no executive powers are to be implied from general references, such as “Executive Powers” or to the “Chief Executive.”

In interpreting the “executive powers” of the President of the United States, the United States Supreme Court long ago held that specific powers may not be implied from the Federal Constitutional charge of “the Executive Power” to the President of the United States. Nor should “executive” powers be implied “from the aggregate of powers under the Constitution.”⁶¹ The case arose when the President, during wartime, found it exigent to short-circuit a labor dispute in the steel industry which threatened to cripple the nation's war effort. In overruling the President's executive order to the Commerce Secretary to take possession and operate steel mills during WWII, the high court held:

The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can be fairly implied The Government admits . . . that the President's order was not rooted in either of the statutes.

It is clear that if the President had authority to issue the order he did, it must be found in some provision of the Constitution and it is not claimed that expressed Constitutional language grants this power to the President. The contention is that Presidential powers should be implied from the aggregate of his powers under the Constitution. Particular reliance is placed on provisions and Article II which say that ‘The executive Power shall be vested in a President . . .’; that ‘he shall take care that the laws be faithfully executed’; and that he

⁶⁰ 58 Cal. App. at 614.

⁶¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, (1952) (emphasis added).

‘shall be Commander in Chief of the Army and Navy of the United States.’ [Emphasis added.]⁶²

The United States Supreme Court held that the order could not be sustained as an exercise of the President’s military powers as Commander in Chief.⁶³

Similarly, the powers of a mayor must stem from either an act of the Council, preemptive state statute, or The Charter itself:

The powers and duties of the mayor or chief executive rest almost entirely upon the proper construction of the charter and the ordinances or bylaws and municipal regulations passed in pursuance of such authority. Accordingly, a mayor is without lawful authority to terminate a municipal employee’s employment without city council approval when no such authority is expressly or impliedly conferred on the mayor by applicable law or the council. The mayor has no authority, except what is expressly or impliedly conferred upon him or her by the charter or applicable law, or by the council or governing legislative body acting within the scope of the law.⁶⁴

To the extent that a distinct power possessed by a mayor is similar to that possessed by the President (or Governor), then issues arising from the exercise of that

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⁶² *Youngstown Sheet & Tube Co.*, 343 U.S. at 587.

⁶³ *Youngstown Sheet & Tube Co.*, 343 U.S. at 587- 588 [emphasis added]: “Nor can the seizure order be sustained because of the several Constitutional provisions that grant executive powers to the President. In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that ‘All legislative Powers herein granted shall be vested in a Congress of the United States’ After granting many powers to the Congress, Article I goes on to provide that Congress may ‘make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or any Department or Office thereof.’”

⁶⁴ 3 McQUILLIN, MUN. CORP., § 12.43, p. 249.

power can be analyzed by resort to legal and policy principles which they happen to have in common.⁶⁵

While analogies must be carefully drawn in analyzing governmental powers, nevertheless, the *Youngstown Sheet* case is instructive on a key point. The role of the executive in any form of government is limited in relation to that of the legislature, and thus, executive powers must be expressed if they are to exist. No amount of necessity to further a power expressly granted (e.g., Commander-in-Chief, control over federal Departments overseeing ongoing wartime efforts) will permit executive powers to be implied.

The State Chief Executive-- the governor-- has limited legislative power and is forbidden from exercising any legislative power except as permitted by the Constitution. Analogously, the Mayor must have an express grant of legislative authority. Otherwise, the chief executive must yield to the creative power of the legislature.⁶⁶

5. The references to executive power in Section 400 are to be read in context, and harmonized with related Charter provisions.

As we have stated, Charter provisions touching upon the same subject are to be read together, as a whole. Interpretations which would place provisions in conflict are to be avoided in favor of those which harmonize and give effect to each word and phrase.⁶⁷ It is necessary to consider the effect of provisions which specifically enumerate the Mayor's powers and duties which follow the language referring generally to the Mayor's executive powers. It is also necessary to consider and harmonize the effect of Charter §§ 200 and 500, which define the role and power of the Council in broad terms.⁶⁸

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⁶⁵ See, for example, *Superior Court v. County of Mendocino*, 13 Cal. 4th 45 (1996), where the Supreme Court considered a superior court challenge to a legislative act declaring the courts to "not be in session" on "unpaid furlough days." The court held that the statute did not violate the separation of powers doctrine because the legislature is free to place reasonable restrictions on the courts that do not materially impair the exercise of the judicial function.

⁶⁶ See, *Superior Court v. County of Mendocino*, 13 Cal. 4th 45, 54 (1996); *Brydonjack v. State Bar of California*, 208 Cal. 439 (1929).

⁶⁷ Opn. City Atty. No. FY 98-1, pp. 2-3 (March 6, 1998).

⁶⁸ See generally, RHYNE, LOCAL GOV'T OPER'S., § 4.12, pp. 69-71.

Where a Charter makes a general statement concerning a power, followed by the enumeration of specific powers, the specified powers are generally held to limit the general statement.⁶⁹

It is appropriate to apply this rule of statutory construction to Charter provisions listing the powers and duties of a City official. The general rule is that the Mayor has no inherent powers or duties except those which are expressed by positive enactments, such as the State Constitution, statutes, and The Charter. Thus, in our case, the Mayor possesses the specific powers enumerated in The Charter,⁷⁰ and, in addition, that authority which is necessary to carry out powers expressly granted.⁷¹

6. Grants of municipal power to persons other than the Council are narrowly construed as exceptions to the general grant of power to the Council, and such powers which must be exercised only in the manner legislatively prescribed.

Where prescribed by statute or charter, the mode or method of exercising a municipal power must be strictly followed. “The method prescribed is a measure of the power, and the power does not exist aside from the mode designated.”⁷²

Where the statute or charter does not prescribe the method of exercising a municipal power, the governing body has reasonable discretion as to the method of exercise.⁷³

⁶⁹ 2A McQUILLIN, MUN. CORP., § 9.22, pp. 234-236.

⁷⁰ 3 McQUILLIN, MUN. CORP., § 12.43, p. 249, stating “The powers and duties of the mayor or chief executive rest almost entirely upon the proper construction of the charter and the ordinances or bylaws and municipal regulations passed in pursuance of such authority. Accordingly, a mayor is without lawful authority to terminate a municipal employee’s employment without city council approval when no such authority is expressly or impliedly conferred on the mayor by applicable law or the council. The mayor has no authority, except what is expressly or impliedly conferred upon him or her by the charter or applicable law, or by the council or governing legislative body acting within the scope of the law” McQuillin also states “a mayor may not usurp the legislative function by enacting social policies not adopted by the legislative branch.”

⁷¹ 2A McQUILLIN, MUN. CORP., §§ 9.22, pp. 234-236, and 10.12, pp. 337-338 (to the effect that while certain authority may be implied, as is necessary and indispensable to carry out an express power, implied authority can never supplant, enlarge, or supplement powers that are expressly enumerated); see also, RHYNE, LOCAL GOV’T OPER’S., § 4.7, p. 65.

⁷² RHYNE, LOCAL GOV’T OPER’S., § 4.11, p. 68.

⁷³ RHYNE, LOCAL GOV’T OPER’S., § 4.11, p. 68.

Where the state constitution does not prescribe limits to the scope of authority which can be delegated to the mayor, then the state legislature is free to make the determination and may confer as much or as little power upon the mayor's office as, in its discretion, it deems necessary to effect the purposes for which the office was created. The municipal legislature may also be empowered to delegate responsibilities to the mayor. It cannot permit the mayor's authority to exceed the limits imposed by the jurisdiction's constitution, statutes, or municipal laws.⁷⁴

7. The Mayor has no power to bind the City, except as expressly granted.

The Mayor has authority on a particular matter only when it is expressly or impliedly conferred upon him by The Charter or other applicable law.⁷⁵ The Mayor's right to exercise legislative or judicial powers is not absolute. It has been held on at least one occasion, that a mayor's legislative powers can arise only through an express legislative grant and not by implication. Another court has stated that the mayor need not be vested with any legislative powers.⁷⁶ For example, the veto power is legislative in nature. It exists only to the extent it is granted, and then, only when exercised in the manner expressly granted.

⁷⁴ RHYNE, MUNICIPAL EXECUTIVE, § 10.1, p. 50 [footnotes omitted].

⁷⁵ RHYNE, MUNICIPAL EXECUTIVE, § 11.11a, p. 93 "In most jurisdictions, the mayor's power to bind the municipality is contingent on the degree of authority conferred upon him by either the state or municipal legislature. He is not the municipality's principal. Rather, the legislative body, though itself an elective body, is considered to be. If the mayor is not either expressly authorized to act on the city's behalf, or third persons are not so informed by the legislature or its duly authorized representatives, then any actions taken by the mayor which legally obligate the municipality to perform some duty, or to forbear performing it, will not be binding. ¶ . . . [T]hat body is generally authorized to designate some person other than the mayor as the city's representative. This will not hold true where the state's constitution or statutes or the municipality's laws provided otherwise."

⁷⁶ RHYNE, MUNICIPAL EXECUTIVE, § 10.1, p. 50 (citing *Jacobs v. Board of Supervisors of City and County of San Francisco*, 100 Cal. 121 (1893)).

The power is not inherent in the Mayor's office.⁷⁷ Thus, in our case, The Charter grants the Mayor veto power over some, but not all, legislative actions.

8. Implied and Inherent powers; common-law powers.

The McQuillin treatise observes that in most jurisdictions it has been expressly held that municipal corporations have no inherent powers, especially as to sovereign, governmental, or legislative matters, or that they have no inherent power to do particular things. The general rule denies the existence in municipal corporations of inherent powers, based on the fact that the corporation is created by the law and derives all its powers from that law.⁷⁸

Because powers which are essential or indispensable are easily implied from any rationally designed grant of express corporate authority, there has been little need to identify a separate category of implied powers.⁷⁹ The law sometimes recognizes those powers necessarily arising from those expressly granted, and also those reasonably inferred from the powers expressly granted. Or, the law recognizes powers essential to give effect to powers expressly granted. It is unnecessary to identify "indispensable" powers, which are in many instances difficult to distinguish from inherent powers, as to the existence of which the authorities are in conflict.

In all cases, however, there can be no implied powers independent of express powers, or in conflict with express powers.⁸⁰

The powers to prepare the budget, adopt the budget, and direct staff illustrate express versus implied powers, and their potential interplay. Under Charter § 1202 each department head is required to:

⁷⁷ RHYNE, MUNICIPAL EXECUTIVE, § 15.13, pp. 137-138 ("The municipal chief executive has veto power only when and to the extent granted him by governing law [footnote omitted], and the power cannot be enlarged by construction; [*Belli v. Board of Supervisors of San Francisco*, 123 Cal. App. 44; 10 P. 2d 793 (1932)], and in the absence of charter or statutory provisions authorizing a municipal chief executive to exercise the veto power, no such power exists [footnote omitted], and the power is not inherent in such office. [footnote omitted] Where the veto power is conferred, it may not be taken away except by express legislative enactment or by clear inference from the statute [footnote omitted])."

⁷⁸ 2A McQUILLIN, MUN. CORP., § 10.11, pp. 333-334.

⁷⁹ DAVID J. MCCARTHY, JR., LOCAL GOVERNMENT LAW, Ch. 1, § 4 (3rd ed.), p. 26.

⁸⁰ 2A McQUILLIN, MUN. CORP., § 10.12, p. 337 (citing *Hurst v. Burlingame*, 207 Cal. 134 (1929); *San Francisco v. Boyle*, 195 Cal. 426 (1925); *Frisbee v. O'Connor*, 119 Cal. App. 601 (1929); *Salinas v. Pacific Tel. & Tel. Co.*, 72 Cal. App. 2d 494 (1946); *Ravettino v. San Diego*, 70 Cal. App. 2d 37 (1945); *Willmon v. Powell*, 91 Cal. App. 1 (1928)).

furnish to the Mayor through the Chief Administrative Officer, estimates of revenue and expenditures for his or her department, detailed in such manner as may be prescribed by the mayor. In preparing the proposed budget, the Mayor shall review the estimates, hold conferences thereon with

the Chief Administrative Officer and respective department heads and may revise the estimates as he or she may deem advisable. [Emphasis added.]

Under Charter § 1203, the Mayor then submits the budget to the Council.

Charter § 706 prohibits the Mayor (and Council) from dealing with or ordering the administrative service, except through the City Manager. Yet the Mayor must have some means to secure the assistance of both the City Manager and department heads if the Mayor is to exercise the power to prepare the budget. Therefore, in relation to the power to prepare the annual budget, the Mayor has the implied authority to receive from the City Manager, City department heads, and the Budget Manager, those services necessary to prepare and submit the annual budget. The Mayor also has to have the authority to direct the City Manager to compel department heads to confer with the Mayor over department budget estimates in connection with the annual budget.

To illustrate how these powers might interplay, let us suppose hypothetically that a Council majority wanted to consider Council-initiated budget priorities first during the annual budget preparation, and, if a Council majority approved those priorities, save the time and expense of considering Mayor-initiated priorities inconsistent with those approved by Council. For this purpose, suppose that Council adopted a policy which provided: staff first prepares a Council annual budget, staff works on the Mayor's proposed only when the Council budget is done; Council first considers its budget before considering the Mayor's; and Council cuts funding for department head and staff preparation of the Mayor's budget, if the Council budget is adopted. This hypothetical policy touching upon the annual budget brings into consideration certain express and implied Council powers: to give "staff direction" when officially acting on policy matters; to assign duties for department heads; to adopt a budget; and refuse to fund certain positions or services. Nevertheless, in this hypothetical, the Council may not use the authority which it has to create, task or fund positions for the purpose of precluding department heads and staff from assisting the Mayor in preparing an annual budget. Nor may the Council adopt its own budget without first considering and reacting to the Mayor's annual budget.

This approach observes the general prohibition of Charter § 706, while giving effect to the Mayor's power to prepare the budget. The Mayor— as the Council— is dependent upon, and has the right to expect that, the City Manager will compel the Administrative Service to provide those services needed to exercise the powers conferred upon the Mayor by The Charter.

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9. Distinctions between Legislative, Administrative and Executive Action.

Legislative power is the authority to make laws while executive power implements existing law. Mayoral enforcement of local law, as we have seen, means the exercise of expressly granted powers to see that the City's Charter, ordinances, and legislative policies are implemented.⁸¹ The executive function of adopting rules and regulations to enforce the law, may become a secondary law source, but limited by the principle that primary legislative power remains the jurisdiction of the legislative body.⁸² Attention is directed to Opinion of the City Attorney, No. FY 98-1 addressing the extent of the Mayor's authority in issuing executive orders.

A legislative act is one in which the Council makes law and policy respecting municipal affairs within its jurisdiction.⁸³ Legislative actions include exercising police powers or adopting general rules of conduct for future governance.⁸⁴ Legislative acts have also been described as "acts of a municipal body constituting a declaration of public purpose, and making provision for ways and means of its accomplishment"⁸⁵ Charter § 605 also contains a list of legislative acts, including: adoption of general and specific plans, adoption of budgets, levy of taxes, grant of franchise, establishment of fines, penalties, or regulations; territorial annexation; calling an election; adoption of budget amendment; determination of officer and employee compensation; authorization of positions; adopting fees; authorizing a referendum.⁸⁶

Examples of administrative actions are: appoint board and commission members; hire or remove employees or officials; suspend, demote, discipline employees; supervise others; hear and decide contested issues; negotiate contracts; execute contracts; enter contracts; manage property, funds or other resources; and expend appropriated funds. It is important to note that while all these actions are administrative, the power to take certain

⁸¹ See generally, 3 McQUILLIN, MUN. CORP., § 12.43, p. 249 (to the general effect that the powers, duties and authority of the mayor or chief executive is only that which is expressly or impliedly conferred by charter or applicable law). See also, RHYNE, MUNICIPAL EXECUTIVE, § 13.1, p. 105 (as to duties to enforce the law, generally).

⁸² See, 2A McQUILLIN, MUN. CORP., § 10.06, pp. 312-313.

⁸³ City Attorney Memorandum to Council President, et al., Re: Practical Questions Under the Mayor-Council Form of Government, p. 3 (February 3, 1997).

⁸⁴ See, *Wheelright v. County of Marin*, 2 Cal. 3d 448, 457 (1970).

⁸⁵ *McKevitt v. City of Sacramento*, 55 Cal. App. 117, 124 (1921).

⁸⁶ See generally, Opn. City Atty. No. FY 96-3, pp. 3-4 (January 3, 1997).

administrative action is vested in the City Council and may not be exercised by the City Manager or Mayor, unless delegated.⁸⁷

The key distinction between whether an act is legislative or administrative is whether the Council action sets new policy or plans or merely pursues existing policy. If the former, it is legislative and subject to veto under Charter § 605; if the latter, then the act is administrative.⁸⁸

An action may have legislative and administrative elements. For example, a Council resolution acquiring property for a park, street or other public purpose is generally legislative,⁸⁹ but where previous legislative action established a testamentary trust fund to purchase a park site, the resolution directing the actual purchase was administrative.⁹⁰ When a proposed action has legislative and administrative elements, it must be evaluated on a case-by-case basis to ascertain whether it is intended to establish a legislative objective or to effectuate an existing legislative objective.

E. The Mayor's first and foremost executive charge is to implement and execute the will of the electorate expressed in The Charter, and the will and policy of the Council.

A primary responsibility of the Mayor as Chief Executive Officer is to implement and execute the will of the electorate, as expressed in The Charter, and the will and policy of the Council, as expressed in the Council's ordinances and resolutions.⁹¹ In furtherance of this responsibility, the Mayor may issue "executive orders." We have concluded that the Mayor has authority to prescribe rules in the form of executive orders that execute broad legislative directives. We also opined that to the extent a particular executive order implements, administers, and/or executes existing laws and ordinances, such executive order is lawful. To the extent a particular executive order does not conform with existing laws and ordinances or attempts to enact new laws and ordinances, the executive order is

⁸⁷ For a general discussion, see, RHYNE, MUNICIPAL EXECUTIVE, Chapter 11, pp. 68-100 (Executive and Administrative Powers).

⁸⁸ Opn. City Atty. No. FY 98-1, p. 9 (March 6, 1998).

⁸⁹ See, *Reagan v. City of Sausalito*, 210 Cal. App. 2d 618 (1962).

⁹⁰ *McKevitt v. Sacramento*, 55 Cal. App. 117 (1921).

⁹¹ RHYNE, MUNICIPAL EXECUTIVE, § 13.1, p. 105 "One of the most important responsibilities held by the municipal chief executive is to ensure that the laws promulgated by the municipal and state legislatures, and United States Congress, are enforced in his jurisdiction. The power to enforce the law should be considered as his most important and vital power, as it arises from the chief executive's primary official responsibility."

null and void.”⁹² The Mayor may also issue policy directives as Executive Orders to the City Manager who may carry out the directives through administrative instructions to staff.⁹³

F. Leadership responsibilities of the Mayor.

Under Charter § 400, the Mayor is to provide leadership, take issues to the people, and marshal public interest for municipal activity. The Mayor is also to provide the liaison between the Administrative Service (City staff) and the Council, fostering a sense of cohesion among Councilmembers and educating the public about the needs and prospects of the City, under Charter § 400(h). Under Charter §§ 400(i) and (j), the Mayor is also to provide community leadership, actively promote economic development, recommend legislative action in the form of measures and ordinances, as well as make other recommendations to Council.

G. Power to contract.

The powers of a municipal corporation are ordinarily applicable to its power to make a binding contract.⁹⁴ Generally, the power to make contracts rests with the governing body– the council– of the city. As stated by one commentator:

It is to be noted that the mayor, the city manager, individual members of a municipal governing body, the head of a department, or any other officer, has only such power to bind the city by contract as is given by charter, statute, or valid action of the governing body.⁹⁵

A contract entered into by a local government without legal authority is “wholly void,” ultra vires, and unenforceable.⁹⁶

In comparison, the general rule, as is the case with The Charter, is that the Mayor has no inherent or implied powers to contract:

⁹² Opn. City Atty. No. FY 98-1 (March 6, 1998).

⁹³ Opn. City Atty. No. FY 98-1, p. 7 (March 6, 1998).

⁹⁴ RHYNE, LOCAL GOV'T OPER'S., § 27.2, p. 935.

⁹⁵ RHYNE, LOCAL GOV'T OPER'S., § 27.2, pp. 936-937.

⁹⁶ *Midway Orchards v. County of Butte*, 220 Cal. App. 3d 765, 783 (1990) (quoting *Dynamic Ind. Co. v. City of Long Beach*, 159 Cal. App. 2d 294, 299-300 (1958)). See also, recent case of *G. L. Mezzetta, Inc. v. City of American Canyon*, 2000 Daily Journal DAR 2427.

The power of the mayor as to making or approving contracts made by municipal officers or departments is such only as is conferred. Sometimes the mayor has power to make contracts for the city or town, but his or her power in this respect is usually limited, and often denied.⁹⁷

It is important to the validity of a municipal contract that the City have both the power to contract, and also that the proper agent or officer of the municipality execute the contract in the manner provided by charter or statute.⁹⁸

Where the power to enter contracts is reposed solely in the municipal legislature, that power may be delegated to the mayor for limited purposes. Generally, only a ministerial duty, such as signing a previously negotiated agreement, or the power to negotiate a specified contract may be delegated. The legislature's power to delegate its power will be even further limited where the mayor is a member of that body.⁹⁹

As discussed in this opinion,¹⁰⁰ as the governing body of the City, the Council is principal and agent of the City. Under our form of government, The Charter places the general powers of the City in the Council. This includes, but is not limited to, control of all legal business and proceedings of the City, and the power to settle claims.¹⁰¹ Settlement agreements are also contracts, within the purview of the Council's power to enter contracts.¹⁰² The City Attorney and other authorized attorneys have "charge" of "any

⁹⁷ 3 McQUILLIN, MUN. CORP., §12.43.10, p. 257.

⁹⁸ "The mayor's power to negotiate, enter into negotiations, modify and cancel contracts on behalf of the municipality is generally conferred by the legislature through constitutional, statutory or charter provisions. It has been held that under the Commission form of government, the mayor and councilmen are the city's principals as well as its agents, and that their powers to enter into contracts for and in the city's name is absolute subject to legally imposed limits. ¶The power to execute a contract does not necessarily include the power to negotiate or enter into a contract. Thus, in those jurisdictions where the mayor's contractual powers are not inherent, the pertinent legal authority must be referenced in order to determine the scope of his powers." RHYNE, MUNICIPAL EXECUTIVE, § 11.11, pp. 89-90.

⁹⁹ RHYNE, MUNICIPAL EXECUTIVE, § 11.11, p. 92 [footnotes omitted].

¹⁰⁰ See, Section A 2. g., supra (Definition of terms, etc.) and Section L, infra, (The Charter vests the general powers, etc.).

¹⁰¹ Fresno Charter §§ 200, 500 and 803; See also, Opn. City Atty. No. FY 98-1 (March 6, 1998).

¹⁰² Fresno Charter §§ 200, 202, 500 and 803(g).

litigation or matter” assigned to them by the Council. And the City Attorney and other authorized attorneys serve at the will of the Council.¹⁰³

Council control of litigation under our form of government is consistent with the general practice as well. As one treatise states it, “ The better view is that the mayor as a fiduciary may not settle any claims against the city.”¹⁰⁴

As a general rule, a mayor has no authority by virtue of his office to employ legal counsel. “Where the mayor is not empowered to participate in litigation matters and where no emergency warrants his participation, any actions taken by him in this area will be void.”¹⁰⁵

Our Charter follows the general rule. As we have opined:¹⁰⁶

The Council is charged by The Charter with “control of all legal business and proceedings” of the City. The Charter also authorizes the Council to “employ other attorneys to take charge of any litigation or matter or to assist the City Attorney therein.” Under The Charter, if a City Official or employee is to be advised by counsel other than the City Attorney at City expense concerning any legal business and proceedings of the City, only the Council determines whether to do so and whom to employ for that purpose.

A City Official’s need or desire for legal representation and advice during the course and scope of his or her employment arises in different contexts. By far, advice is most frequently provided during the Official’s conduct of the day-to-day matters falling within the purview of his operational and administrative duties. In the case of the Mayor, such matters might include negotiating or reviewing the legal sufficiency of the City Manager’s employment agreement, determining whether the financing for a public project to be proposed to the Council requires voter approval, determining whether a particular Council final action is subject to veto, etc. These are “legal business” or “matters” for which the Mayor is provided legal representation or advice by the City Attorney, exercising the

¹⁰³ Fresno Charter § 803(g).

¹⁰⁴ RHYNE, MUNICIPAL EXECUTIVE, §14.3, p. 114 [footnote omitted].

¹⁰⁵ RHYNE, MUNICIPAL EXECUTIVE, § 14.1, pp. 111-112 [footnote omitted].

¹⁰⁶ Opn. City Atty. No. FY 99-1, p. 12 (February 25, 1999).

rights under The Charter enumerated above. [Footnotes omitted.]

The Council has delegated specified contract authority to the City Manager, Department Directors, and City Attorney through adoption of ordinances and resolutions.¹⁰⁷

H. The Mayor possesses enumerated appointment powers.

Generally, a Mayor may be authorized by law to appoint an official, department head, or members of a subordinate body. Consistent with this principle, the Mayor is authorized by The Charter to appoint the members of “boards or commissions” established by The Charter, “with the approval of the Council.”¹⁰⁸ The Mayor’s appointment powers are generally strictly construed.¹⁰⁹ The Mayor also appoints and may remove the City Manager.¹¹⁰ The City Manager works under the direct supervision of the Mayor.¹¹¹

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¹⁰⁷ See, e.g., Fresno Municipal Code § 3-109 (delegating contracting authority to Purchasing Manager in certain situations where appropriation has been made), Resolution 94-125 (delegating authority to City Manager and Department Directors to contract consulting services for which appropriation is made), Resolution 80-168 (Transportation Director authorized to approve lease termination and consent to assignments and subleases), Resolution 91-279 (authorizing Transportation Director to execute Temporary Permit Agreements), and Resolution 7826 (authorizing City Attorney to contract for professional legal services).

¹⁰⁸ Fresno Charter § 902.

¹⁰⁹ RHYNE, MUNICIPAL EXECUTIVE, § 11.3a, pp. 70-75: The mayor’s power to appoint a designated officer will not by itself allow him to appoint the designee’s subordinates. “Thus, where the mayor was authorized to appoint the city fire commissioner; he, and not the mayor had the sole power to appoint and remove fire department members. ¶The mayor’s appointment power may be limited in scope. He may be allowed to make an appointment only when a person elected to public office is disqualified. Alternatively, he may be empowered to appoint only designated officers.”

¹¹⁰ Fresno Charter § 702.

¹¹¹ Fresno Charter § 705.

I. The Mayor's power to veto, seek reconsideration, recommend the budget, and recommend legislation.

1. The Mayor may recommend legislation.

Under the Mayor-Council form of government,¹¹² the Mayor has a role in legislation. The Charter grants the Mayor authority to recommend legislation and policy, prepare the budget, and veto certain Council actions.¹¹³ Legislation recommended by the Mayor must proceed through the Council for adoption.¹¹⁴ Charter § 400(j) provides, "The Mayor shall recommend to the Council such measures and ordinances as he or she may deem necessary or expedient and to make such other recommendations to the Council concerning the affairs of the City as the Mayor finds desirable."¹¹⁵

This is consistent with the general trend of authority. The mayor is often given the right to take part in all discussions of making recommendations to, and give advice to the municipal governing body; and it is the mayor's responsibility to inform such body of the condition and needs of the municipality.¹¹⁶

The municipal charter will sometimes require the mayor to recommend legislation to the city council, or transmit annual reports to that body regarding the city's and its agencies' finances, affairs and activities. Even where these duties are not expressly required, the mayor will often perform them for efficiency reasons.¹¹⁷

In fact, the general view is that the city manager in a City Manager-Council form of government has a right to submit and recommend legislation. This can be viewed as a corollary of the duty of the city manager to attend all council meetings, and/or the right to

¹¹² See generally, City Attorney Memorandum Re: Mayor-Council Form of Government, Summary and Transition Recommendations (June 7, 1996).

¹¹³ See generally, City Attorney Memorandum Re: Mayor-Council Form of Government, Summary and Transition Recommendations, pp. 7-8 (June 7, 1996).

¹¹⁴ See, Fresno Charter § 500.

¹¹⁵ Fresno Charter § 400.

¹¹⁶ RHYNE, MUNICIPAL EXECUTIVE, §15.8, p. 132.

¹¹⁷ RHYNE, MUNICIPAL EXECUTIVE, §15.1, p. 123.

take part in council discussion and to recommend for adoption such measures as the city manager deems necessary and expedient.¹¹⁸

2. Specific Provisions in the Fresno Charter providing for the Mayor's Veto.

The Mayor is authorized to veto legislative acts.¹¹⁹ This power is broad, but not unlimited.¹²⁰ In general, the Mayor is authorized to veto most legislative acts. Exceptions include preliminary actions, site-specific land use actions, and site-specific development agreements. A veto can be overridden by five votes of the Council.¹²¹

3. The Mayor may compel reconsideration of certain legislation which the Council has considered but failed to adopt.

The last paragraph of Charter § 605 provides:

Any proposed ordinance, resolution or other action subject to power of the Mayor's veto which is voted on by the Council that is not approved by the Council, shall be reconsidered by the Council on written request of the Mayor within ten days after the Council's action on such resolution or ordinance. The Council shall reconsider such measure at its convenience, but not later than thirty days after the filing of the Mayor's request therefor.

Under this Charter provision, the Mayor may compel the Council to reconsider legislation which the Council fails or refuses to adopt, after considering the proposal.¹²² Because this power of reconsideration is a corollary of the power to veto, the opinion referenced above relating to the veto power will also address it in greater detail. We note that prior to the effective date of the Mayor-Council form of government, this Office prepared an Ordinance entitled "Implementation of Mayor-Council Form of Government."

¹¹⁸ Fresno Charter § 705(j) re attending Council meetings, Charter § 706 re policy direction and inquiry from the Council, and Charter 605(h) liaison through the Mayor with the Council as head of the Administrative Service. See generally, RHYNE, MUNICIPAL EXECUTIVE, § 15.8, p. 132.

¹¹⁹ Fresno Charter § 605.

¹²⁰ See generally, Fresno Charter § 605 for limitations and qualifications upon the grant of the veto power.

¹²¹ Fresno Charter §§ 605 and 609.

¹²² Fresno Charter § 605 (d), last paragraph; See, City Attorney Memorandum to Mayor, Councilmembers, and City Manager Re: FY2000 Budget Adoption Issues– Legal Memo No. 1 (June 18, 1999).

This Ordinance sets forth the procedures regarding vetoes and reconsiderations. The Ordinance is codified in Chapter 2, Article 3 of the Fresno Municipal Code.

J. The Mayor has substantial authority in the preparation of the City budget.

Under The Charter, the Mayor is authorized to prepare, present and recommend a budget to the City Council.¹²³ Although the Council is not required to adopt any or all of the Mayor's proposed budget, the Council is obligated to: hold hearings on the Mayor's budget, consider the Mayor's budget, reconsider the entire budget, if the Council fails to adopt it (for example, in favor of an alternative budget), and reconsider any proposed line-item which the Council failed or refused to include in its budget.¹²⁴

K. Administrative duties of the Mayor.

Under The Charter, the Mayor is the Chief Executive Officer with the power and responsibility to provide for the proper and efficient administration of all affairs of the City. However, The Charter does not specifically empower the Mayor to take administrative authority. Instead, the Mayor exercises administrative authority through the exercise of the powers enumerated in The Charter. The most significant of these are: appointment and supervision of the City Manager, execution and enforcement of legislative policy, liaison between administrative service and Council, foster cohesion among City Council, and investigate the matters within the purview of the Mayor.¹²⁵

The City Manager is responsible to administer "all affairs of the City not otherwise assigned" by The Charter.¹²⁶ The City Manager is the Chief Administrative Officer who is the head of the administrative service of City government.¹²⁷ The City Manager is, therefore, the principal management official charged with implementing ordinances and policies under the general supervision of the Mayor.¹²⁸

¹²³ Fresno Charter §§ 1203 and 1204.

¹²⁴ *Id.*; See generally, City Attorney Memorandum to Mayor, Councilmembers, and City Manager Re: FY2000 Budget Adoption Issues— Legal Memo No. 1 (June 18, 1999).

¹²⁵ See generally, Charter § 400.

¹²⁶ Fresno Charter § 705.

¹²⁷ Fresno Charter § 700.

¹²⁸ City Attorney Memorandum Re: Mayor-Council Form of Government, Summary and Transition Recommendations, p. 6 (June 7, 1996); Opn. City Atty. No. FY 98-1, p. 3 (March 3, 1998). The Committee recommended and the Council accepted that the City Manager under the new form of government was to be a "professional City Manager"-- not a political City Manager. The City Manager's role is defined by, and his authority is derived from, The Charter, not from the Mayor. Fresno Charter §§ 700 and 705. The City Manager, under the supervision of the Mayor, serves the City by executing the ordinances, resolutions, and policies adopted by the Council. *Ibid.* The City

1. The City Manager administers policy and legislative actions of the City.

As noted above, a fundamental charge set forth in The Charter upon the Mayor is to “execute and enforce all laws and ordinances and policies of the City.” This provision is self-executing.¹²⁹

The Mayor is also charged to supervise the City Manager. It is axiomatic that such supervision must be consistent with all laws, including The Charter.¹³⁰ Further, The Charter directs the Mayor to “provide the liaison between the administrative service and the City Council” and to foster “cohesion among Councilmembers.”¹³¹ Coupled with the mandate to “marshal public interest in and support for municipal activities,” the Charter contemplates that, as it pertains to this discussion, the Mayor will direct and supervise the City Manager such that the Administrative Service accomplishes the direction of the Council when implementing the City’s Charter, ordinances, and policies. Although supervised by the Mayor, the City Manager exercises powers and performs duties subject to Council’s official action on policy matters.

Manager is also responsible for ensuring that the officers and employees (whose positions and duties The Charter authorizes the Council to establish) lawfully perform their duties. Fresno Charter § 801. The City Manager is bound to discharge the duties of his office consistent with, and in furtherance of, all local laws, including The Charter, the Fresno Municipal Code, as well as other ordinances and resolutions adopted by Council. In a proper case, the City Manager may be required to perform duties imposed on him by law in a mandamus proceeding, even as against contrary direction from the Mayor. (Cal. Civ. Proc. Code §§ 1086, et seq.; see, for example *City of San Diego v. Capps*, 32 Cal. App. 461 (1917).)

¹²⁹ Fresno Charter § 400(a).

¹³⁰ Fresno Charter § 1502 makes violations of The Charter a misdemeanor. We note also that municipal law generally holds that the municipal chief executive is personally liable to a party injured when acting in an executive or administrative capacity, entirely outside the scope of his authority. The basis for this rule is that the executive did not act under any authority accorded, either directly or indirectly, by the municipal corporation. A municipal chief executive may be personally liable for acts in excess of authority, such as the removal of a municipal officer, issuance of an illegal order to municipal employees, censorship of a public exhibit, coercion of a city manager to remove a municipal employee, procure public funds, seize public property, or abuse of power. RHYNE, MUNICIPAL EXECUTIVE, §17.7, p. 166.

Mandamus is the proper remedy to require a public official to perform a duty required by law. See, Opn. City Atty. No. FY 99-1, pp. 24-26 (February 25, 1999). Additionally, a city official engaged in a pattern of refusing to perform his or her duty under the Charter and follow council direction may be liable in an action for declaratory and injunctive relief. *City of Redondo Beach v. Delong*, 123 Cal. App. 3d 1035 (1981).

¹³¹ Fresno Charter § 400(h); see, Opn. City Atty. No. FY 99-1 (February 25, 1999).

The City Manager, as much as the Mayor, must perform his or her Charter duties, including enforcing and carrying out duly issued legislative and administrative Council direction:

While the functions of the common council are in the main legislative, that body has other duties devolving upon it and, in a qualified sense and subject to the restrictions of the city charter, is the governing arm of the municipality. Where officers of a city charged with the performance of ministerial duties, neglect or refuse to follow the direction of the law under which they have assumed office, it would seem most proper that the city by its common council should be permitted in a proceeding of this kind [mandamus] to compel such officers to fulfill the obligation which their oath has imposed upon them . . . The people of the city of San Diego in their Charter determined that they would have a chief of police, and made it incumbent upon the mayor as a purely ministerial duty to name someone to fill that office. To say that the mayor may refuse to heed the express mandate of the electors of the city would be to give countenance to a species of executive nullification which the law will not tolerate. When the mayor took his oath, and accepted the office, he bound himself to perform all the duties which the Charter imposed upon him. No discretion was left under which he might in the regard here considered supplant the judgment of the people solemnly declared at their charter election, by carrying out a policy which might satisfy his individual notion of what was best to be done in the circumstances.¹³²

2. The Charter invests the Council with administrative and policy powers, including the power to direct by “official action” the performance of administrative tasks necessary for the Council to perform its legislative, administrative, and other duties.

In prior opinions relating to the Mayor-Council form of government, we recognized that The Charter grants significant and substantial powers to the Council.¹³³ While the City Manager and Mayor can only exercise those powers specifically enumerated in The Charter, and only to the extent so enumerated, the Council possesses the balance (the

¹³² *City of San Diego v. Capps*, 32 Cal. App. 461, 462-463 (1917).

¹³³ Opn. City Atty. No. FY 98-1, pp. 5-6 (March 6, 1998); Opn. City Atty. No. FY 99-1, pp. 6-9 (February 25, 1999).

residuary) of the power and authority necessary to govern the City.¹³⁴ We have said, “by expressly excluding administrative and quasi-judicial acts from the Mayoral veto, The Charter expressly recognizes Council’s rights to exercise these powers.”¹³⁵

By the express terms of The Charter, it is the duty of the Mayor and City Manager to implement not only legislative acts, but also the official policy and administrative decisions of the Council. Thus, The Charter enjoins the Mayor as follows: “The Mayor shall execute and enforce all laws and ordinances and policies of the City.”¹³⁶ The City Manager is responsible “for the administration of all affairs of the City not otherwise assigned in this Charter.” And the Council may direct the City Manager to execute his or her powers and duties in a particular way “by official action taken in policy matters.”¹³⁷ Since the City Manager’s duty to follow Council direction flows from the Council’s administrative and policy powers, it is unnecessary for the Council to enact a formal resolution or ordinance when giving this direction.¹³⁸

The Council, by majority action, may give policy direction to the City Manager who is responsible to administer legislative actions. The Council cannot undertake the staff work necessary prior to its consideration and decision-making on Council days by itself. The work must be done by legal staff or the administrative staff who works under the City Manager. In other words, the Council must be able to depend on staff work to enable it to discharge its duties as a Council. For example, the Council may take action to direct the City Manager to return with staff work necessary for initiation of a plan amendment. Also, the City Manager must administer the decisions made by Council either directly or by assigning staff to work on particular matters.¹³⁹

¹³⁴ City Attorney Memorandum Re: Mayor-Council Form of Government, Summary and Transition Recommendations, p. 8 (June 7, 1996).

¹³⁵ Charter § 605(a). Opn. City Atty. No. FY 98-1, pp. 5-6 (March 6, 1998).

¹³⁶ Fresno Charter § 400(a) [emphasis added].

¹³⁷ Fresno Charter § 706.

¹³⁸ Fresno Charter §§ 600, 605(a), and 400(e) and (f).

¹³⁹ City Attorney Memorandum Re: Practical Questions Under the Mayor Council Form of Government, p. 8 (Questions 13-15) (February 1997).

The general rule is that, in a city manager government, the mayor generally will not hold any supervisory authority.¹⁴⁰ In accord with that general principle, and with the

¹⁴⁰ RHYNE, MUNICIPAL EXECUTIVE, § 11.4, p. 79.

City's desire to retain a "professional City Manager,"¹⁴¹ Fresno's Charter places limited supervisory powers in the office of Mayor (i.e., supervision of the City Manager). Not only the Council, but also the Mayor, is prohibited from interfering with the execution by the City Manager of his powers and duties, or ordering, directly or indirectly, the City Manager or department head to appoint any person to, or remove any person from, an office.¹⁴²

Since The Charter does not authorize the Mayor to appoint any municipal officer or employee except the City Manager, he lacks that authority.¹⁴³ The same rule applies to the removal of officers and employees— it cannot be exercised by the Mayor without expressed authority.¹⁴⁴

L. The Charter vests the general powers of local governance in the Council as the City's legislative and governing body.

As a "home rule" charter city, the City has the right to legislate and to exercise all rights, powers, and privileges granted by The Charter, state law, or other applicable law.¹⁴⁵

The Charter allocates the power of city government. Article II of The Charter is the foundational grant of City powers. It lays the groundwork for interpreting The Charter §§ 400 and 500, which delineate specific powers of the Mayor and Council.

Article II and § 500 of The Charter vests the primary power of the City in the Council. Those Charter sections provide:

¹⁴¹ Charter Review Committee, Report of the City of Fresno Charter Review Committee to the Fresno City Council, p. 2 (Recommendations) (November 3, 1992). See, RHYNE, MUNICIPAL EXECUTIVE, §11.4.

¹⁴² Fresno Charter § 706.

¹⁴³ RHYNE, MUNICIPAL EXECUTIVE, § 11.5, pp. 79-80: "The mayor cannot suspend a municipal officer or employee absent statutory authority. Furthermore, where there is no statute or city ordinance or charter provision giving the mayor the power to suspend, it will not be implied from a general grant of superintending control over the city's officers. An express grant of power to suspend municipal officers will not authorize the mayor to suspend municipal employees. Nor does the mayor have any implied suspension power." [Footnotes omitted.]

¹⁴⁴ RHYNE, MUNICIPAL EXECUTIVE, § 11.6, pp. 81-83: "The state constitution, statutes, or municipal charter may authorize the mayor to remove an elected or appointed officer, or municipal employee, from his position Of course, state or municipal law may also prohibit, or fail to authorize the mayor to exercise any removal power ¶Sometimes, the law may provide that the mayor can exercise his removal power only in conjunction with the city legislature. If the mayor attempts to exercise the power unilaterally, the officer or employee's dismissal will be void and he will be entitled to reinstatement." [Footnotes omitted.]

¹⁴⁵ Fresno Charter Article II.

SECTION 200. GENERAL POWERS. The City shall have the power to make and enforce all laws and regulations in respect to municipal affairs, subject only to such restrictions

SECTION 500. POWERS VESTED IN THE COUNCIL. All powers granted to and vested in the City of Fresno shall, except as herein otherwise provided, be exercised by a Council to be designated the Council of the City of Fresno. Said Council shall be the governing body of the City, and, subject to the express limitations of this Charter, shall be vested with all powers of legislation in municipal affairs adequate to a complete system of local government consistent with the Constitution of the State.

The provisions of Charter § 500 which designate the Council as the City's governing body institute the Council as the City's principal and general agent. Charter § 500 also provides that the Council shall exercise "[a]ll powers granted to and vested in the City," except as The Charter otherwise provides. This proviso precludes the Council from exercising any of the Mayor's powers. The law provides that the nature and extent of a mayor's powers are those which a city charter expressly enumerates. Therefore, the effect of Charter § 500 is that the Council exercises all powers which the City may possess, except those enumerated in The Charter as vested in the Mayor.¹⁴⁶

The Charter follows a universal trend in American local government. The general grant of power includes not only the City's legislative power, but also any executive, administrative and judicial power which the State Constitution or Legislature authorizes the City to exercise in respect to its municipal affairs.

Usually a power conferred without limitation upon the municipal corporation may be exercised by the common council or legislative body as the general agent of the corporation, and by no other authority. A fortiori, power conferred upon the council or legislative body in express terms cannot be delegated otherwise than in accordance with the expression of terms.¹⁴⁷ [Emphasis added.]

¹⁴⁶ Rhyne, MUNICIPAL EXECUTIVE, § 10.5, p. 64 ("Where the mayor is affirmatively granted the authority to exercise one or more particular powers, the legislative body will be precluded from exercising them").

¹⁴⁷ 2A McQUILLIN, MUN. CORP., § 10.42, p. 448 (citing, *inter alia*, *Oakland v. Carpentier*, 13 Cal. 540 (1859); *Pearson v. Washington*, 439 S. W. 2d 756 (Mo.) (1969) (delegation of powers of mayor and council to city administrator invalid); *Domar Elec., Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 170 (1994)).

As a general rule, a local governing body is the “general agent or policy-making body of the municipality and exercises all of the legislative, administrative and judicial powers not expressly committed by law to other boards and officers.”¹⁴⁸ Consistent with this general rule, Charter § 500 vests the exercise of all municipal powers in the Council as “governing body,” except as expressly provided in The Charter.

M. The Council possesses the executive powers of the City, not otherwise apportioned to other officials.

The Council is the governing body of the City and, subject only to the express limitations of The Charter,¹⁴⁹ is vested with all powers of legislation in municipal affairs “adequate to a complete system local government consistent with” the state constitution¹⁵⁰ Typically, these powers involve legislative and executive powers.¹⁵¹

Like corporate boards, the Council acts at meetings where its actions are recorded by formal or minute resolutions. The Council appoints the City Attorney and City Clerk and approves the City Manager's appointment of the Controller. The Council may give “staff direction” to the City Manager by official action taken in policy matters.¹⁵² The Council also supervises the City Attorney, and adopts rules and procedures for the conduct of Council meetings, contracts with public or private agencies for the performance of any city administrative function, contracts with private counsel to assist the City Attorney, writes-off claims owing to the City, and establishes licenses, fines, rents, and forfeitures. Council's authority to control litigation permits it to defend and compromise suits, to initiate litigation, to deny claims for damages, and to compromise claims.

Clearly, the Council has duties other than legislative. By expressly excluding administrative and quasi-judicial acts from the Mayoral veto, The Charter expressly recognizes Council's right to exercise these powers.¹⁵³ This broad grant of general municipal power is not unique; it is the general practice: “Executive powers are often vested in the council or legislative body and exercised by motion, resolution or

¹⁴⁸ RHYNE, LOCAL GOV'T OPER'S., § 5.2, p. 72.

¹⁴⁹ Fresno Charter § 500.

¹⁵⁰ CAL CONST., Art. 11, §§ 5 and 7; Charter § 200 (i.e., the power to make and enforce all laws and regulations respecting municipal affairs).

¹⁵¹ 2A McQUILLIN, MUN. CORP., § 10.06, pp. 311-313.

¹⁵² Fresno Charter § 706 (by negative implication).

¹⁵³ Fresno Charter § 605(a).

ordinance.”¹⁵⁴ The prescribed executive power of the Mayor is an exception to this general grant of power.¹⁵⁵

The Charter could have adopted a “federal plan,” but it did not. If the Mayor is to possess powers akin to those of the federal or state chief executive, then such an intent must be manifest from both the framework and provisions of The Charter. Under Fresno’s Charter, the powers of the Mayor are an exception to otherwise broad powers of the Council. The Mayor’s powers of veto, supervision of the City Manager, etc, are creations of Charter amendments. Under ordinary rules of legislative (statutory) construction, one is bound to narrowly construe any exceptions to the general grant of power to the Council. Stated otherwise, because the Mayor’s position and powers are a creature of statute (our Charter), and since the powers of the Mayor’s position are an exception to the broad powers granted to the Council, the Mayor’s powers are only those specifically enumerated in The Charter. Under our present form of local government, the Mayor has no inherent “executive powers.”

N. The limitations of the “Separation of Powers” doctrine.

The Committee which recommended a mayor-council form of government spoke of “checks and balances.” The ultimate Charter language approved by the Council and submitted to the voters made changes in the respective powers of the Council and Mayor. The powers were intended to be complementary to each other. The term “checks and balances” is a term of art which in and of itself does not create a pure separation of powers model. Moreover, the term was utilized in recommendations of the Committee only. As we have stated, the Council made changes to the Committee’s recommendations; the actual Charter language submitted to the voters was different from that proposed and adopted. The term appears nowhere else in the legislative history. Moreover, we note that The Charter amendments approved by the voters do not contain language similar to that contained in the State Constitution, through which the State Constitution established a separation of sovereign powers.¹⁵⁶ While there is something

¹⁵⁴ 2A McQUILLIN, MUN. CORP., § 10.06 (citing *Simpson v. Hite*, 36 Cal. 2d 125 (1950), (performances of statutory duty to provide place for superior and municipal courts, i.e., locating site, constructing buildings, etc., as administrative acts); *Auriemma v. Rice*, 957 F. 2d 397 (7th Cir. 1992) (“Municipal corporations ordinarily are vested with legislative and executive powers, the latter being sometimes referred to as administrative or ministerial powers or duties. Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them, or appoint the agents charged with the duty of such enforcement.”)).

¹⁵⁵ Fresno Charter § 400.

¹⁵⁶ One of the key purposes behind the doctrine is to avoid the accumulation of all the basic or fundamental powers of the government in one person or group. 13 Cal. Jur. 3rd, *Constitutional Law* § 100.

akin to a “separation” of power between the Mayor and Council under The Charter, it is not based on a separation of powers model.¹⁵⁷

Analogies which draw wholesale upon the “separation of powers” doctrine are of limited usefulness because Fresno’s form of government is not based on a state or “federal plan.” A government with separate legislative and executive functions is well-established at the federal and state levels.¹⁵⁸ The separation of powers doctrine is reflected in the State Constitution.¹⁵⁹

It is not a violation of the “separation of powers” doctrine for all of a city’s powers to be placed in its city council because the separation of powers doctrine does not apply to city government.¹⁶⁰ The City of Fresno is not a sovereign but a “creature,” or product, of the exercise of state constitution and law.¹⁶¹

The State, by legislation in matters of statewide concern, or the people, by direct action in amending the constitution, have plenary power over cities and may dissolve them,

¹⁵⁷ *Strumsky v. San Diego County Employees Retirement Assn.*, 11 Cal. 3d 28, 48-49 (1974); *People ex rel. Atty. Gen. v. Provines*, 34 Cal. 520, 534 (1868); 20 Ops. Cal. Atty. Gen. 69, 70 (1952) (exemplary of a line of authority holding that a strict application of the separation of powers doctrine to local governments is not required).

¹⁵⁸ CAL. CONST., Art. III, § 3.

¹⁵⁹ CAL. CONST., Art. III, § 3 provides: “The Powers of State Government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.”

¹⁶⁰ *Savage v. Sox*, 118 Cal. App. 2d 479 (1953); *Mariposa County v. Merced Irr. Distr.*, 32 Cal. 2d 467 (1948); *Staude v. Board of Election Com’rs of City and County of San Francisco*, 61 Cal. 313 (1882); *People v. Provines*, 34 Cal. 520 (1868); See, 10 P.C.L.J. 29 (1882), and RHYNE, LOCAL GOV’T OPER’G., § 5.2, p. 73, stating “With respect to such local governing bodies, it generally has been held that state constitutional provisions separating governmental powers into executive, legislative and judicial branches apply only to the distribution of powers within the state government, and do not apply to municipal corporations, even though they are created by the state for local governmental purposes.” See also, 2A McQUILLIN, MUN. CORP., § 10.03, p. 299 (citing *Martin v. Superior Court (Sierra Madre)*, 234 Cal. App. 3d 1765 (1991); *City of Woodlake v. Logan*, 230 Cal. App. 3d 1058 (1991) (power to levy general taxes) stating, “Historically, the constitutional principle of the separation of powers has not been applied to the government of cities. The rationale is that separation of powers reduces the threat of an unchecked governing body, but that threat is slight where the governing body is subordinated to the powers of a higher level of government.”

¹⁶¹ Cities may be delegated some of the attributes of the sovereign, such as a judicial branch, power to declare emergencies, etc. However, this power is derivative or dependent upon the State, by constitutional or statutory provision. Thus, the great weight of authority holds that the separation of powers doctrine is inapplicable to cities. A comprehensive (and, to some extent, mutual) system of checks and balances (such as that of the federal government) is unnecessary at the local level. RHYNE, LOCAL GOV’T OPER’G., § 3.3, p. 50 (to the general effect that “municipal corporations are not sovereigns”).

prescribe their form of government, or define the authority of their officials and governing bodies.

Subject to constitutional restrictions, the state has practically unlimited control over its municipalities.¹⁶² McQuillin, the leading treatise on the law of Municipal Corporations, cogently explains the difference between forms of local government, and sovereignty and separation of powers doctrine:

A municipality under such a system¹⁶³ is not in any sense a sovereignty, and hence does not fall within the provision of the constitution that apportions the powers of the state into legislative, executive and judicial. Such requirement, the courts hold, has no applicability to town or city government or to town or city officers. There can be no constitutional objection, therefore, to combining and vesting all municipal powers – legislative, executive and judicial – in the commissioners, to be exercised by them as the representatives of the inhabitants and the corporate authorities of the community.

This constitutional guarantee of a republican form of government applies to the state department only and not to incorporated cities and towns. A constitutional requirement that a home rule charter shall provide for a “mayor, or other chief magistrate, and a legislative body,” has been held not to preclude the adoption of the commission form, and a charter so providing may vest executive as well as legislative power in the legislative body, and constitute the mayor a member of that body.

By combining legislation and administration, the fundamental characteristic of the national and state governments in their separation of the legislative, executive and judicial functions, is not observed.¹⁶⁴

¹⁶² RHYNE, LOCAL GOV'T OPER'S., § 3.4, p. 51: “[t]he great weight of authority, including the United States Supreme Court, has denied the existence, in the absence of state constitutional provisions, of any inherent right of local self-government which is beyond the legislative control of the state.”

¹⁶³ Referring to a commission system, but noting that a commission municipality generally has the same powers as other municipalities. See, for example, *Independent Paving Co. v. City of Bay St. Louis, Miss.*, 74 F. 2d 961 (1935).

¹⁶⁴ 2A McQUILLIN, MUN. CORP., § 9.20, p. 219, also observing: “In municipal corporations, the executive or administrative officers must observe the valid legislation enacted by the local legislative (continued...) ”

Inherent municipal executive power or authority is also untenable to the extent it is a corollary of the theory or doctrine of “inherent,” “sovereign,” or “local self government.”¹⁶⁵ The doctrine of an inherent right of local self government by municipal corporations has been expressly rejected. Except to the extent granted by the State Constitution, the general rule in this country is that a municipal corporation has no inherent right of self-government that is independent of legislative control.¹⁶⁶

Concerning cities, the state can control their number, size, territory, nature and duration of powers, among other things. A charter can be amended, changed, or even abolished at the will of the state, usually by the legislature.¹⁶⁷

Cities are created by (and thus, “creatures of”) the state.¹⁶⁸ As creatures of the state, cities possess and exercise only those powers granted by their charter, general laws

¹⁶⁴(...continued)

body, but frequently they have a wide discretion. Oftentimes the administrative agents do not cooperate with the legislative body and this results in no action. Each department is disposed to extend its province, and sometimes the legislative seeks to subject the executive officers to its will. Hence, by trying to separate these powers and placing them in independent bodies in order that one may be a check upon the other, and thus prevent abuse of public power, complication and blocking of public service frequently result. In Greece the primary assembly was both executive and legislative. In England the legislature governs through the executive which is dependent on it. In the commission form the persons who legislate also carry out their legislation and they are not dependent on another set of officers. They know what rules are needed, and they themselves provide them.”

¹⁶⁵ As one treatise has stated, “The reason upon which this general rule is based is that the municipal corporation is a creature of the legislature from which it, within constitutional limits, derives all its rights and powers . . . [T]he United States Supreme Court has held that there is no place in the federal system for sovereign cities, largely on federalism grounds.” 2 McQUILLIN, MUN. CORP., § 4.82, pp. 178-179.

¹⁶⁶ 2 McQUILLIN, MUN. CORP., § 4.82, p. 179 (“the decisions recognizing the inherent right of local self-government ‘are unquestionably against the great weight of judicial decision in this country and are unsound in principle’”) (See, e.g., *Golden Gate Bridge & Highway Dist. v. Felt*, 214 Cal. 308 (1931)).

¹⁶⁷ RHYNE, LOCAL GOV’T OPER’S., § 3.3, p. 50.

¹⁶⁸ 1 McQUILLIN, MUN. CORP., § 1.42, p. 53 (“The state is regarded as the creator, and the municipal corporation as the creature. The corporation may do what the state authorizes and nothing more.”).

or the state constitution.¹⁶⁹ These rules ordinarily apply as well to municipalities operating under home rule charter.¹⁷⁰

Applying these principles against the provisions of the City's Charter, the administrative and executive powers of the City are vested in the Council, except as The Charter has expressly authorized the Mayor, City Manager, or other official to exercise specified powers. Through delegation, the Council can authorize the Mayor, City Manager and others to exercise administrative and executive powers not granted by The Charter.

O. The Council may delegate administrative and executive powers not otherwise vested in Mayor or City Manager.

A corollary to the separation of powers doctrine is that legislative bodies cannot delegate legislative powers to an administrative body or an executive official.¹⁷¹ The crux of legislative authority is the ability to create law. Thus, the Council cannot, in effect, delegate to the Mayor the authority to create law. However, the Council can declare a policy, fix the primary standard, and delegate to the Mayor (and others) the authority to enforce the legislation by prescribing administrative rules and regulations to promote and implement the legislative purposes— i.e., to “fill up the details.”¹⁷²

As a general matter, the Council is not permitted to delegate any of its power to the Mayor unless it is authorized to do so.¹⁷³ The Council may delegate to others the power

¹⁶⁹ RHYNE, LOCAL GOV'T OPER'S., § 4.7, p. 64. See also, 2A McQUILLIN, MUN. CORP., § 10.09, pp. 320, 322: “A municipal corporation is a creature of the law established for special purposes and its corporate acts must be authorized by its charter, or by other laws. Excluding the question as to the existence of so-called inherent powers of a municipal corporation, the powers of a municipal corporation include (1) powers expressly conferred by the constitution, statutes or charter; (2) powers necessarily or fairly implied in, or incident to, the powers expressly granted; and (3) powers essential to the declared objects and purposes of the municipality, the latter often being classified as among the implied powers. This enumeration of powers, commonly referred to as “Dillon's Rule,” is exclusive and no other powers exist . . . ¶As creatures of statute, arms or departments of the municipal government have only those powers that are expressly granted by a statute and those powers that are necessary to implement the expressed powers.”

¹⁷⁰ RHYNE, LOCAL GOV'T OPER'S., § 4.7, citing *Harden v. Superior Court*, 44 Cal. 2d 630 (1955) and *Wiley v. Berkeley*, 136 Cal. App. 2d 10 (1955). See also, *Martin v. Superior Court (Sierra Madre)*, 234 Cal. App. 3d 1765 (1991); *City of Woodlake v. Logan*, 230 Cal. App. 3d 1058 (1991) (power to levy general taxes).

¹⁷¹ *Kugler v. Yocum*, 69 Cal. 2d 371 (1968).

¹⁷² *Kugler v. Yocum*, 69 Cal. 2d at 376.

¹⁷³ RHYNE, MUNICIPAL EXECUTIVE, §11.2, p. 69.

and obligation to execute or administer policy,¹⁷⁴ but only to the extent that The Charter has not expressly vested those powers in the Mayor or City Manager.

Subject to the general rules discussed in this opinion, the duties and powers imposed upon the Mayor, designated departments and officers are considered in the nature of public trusts. They cannot be delegated or surrendered to other officers, departments, or other persons. Where The Charter imposes upon the Mayor the duty to consider and pass upon Council legislation in order to decide whether they should be approved or vetoed, that duty cannot be delegated to another.¹⁷⁵

And wherever the Council is charged with the supervision of specific officers and employees, the Council may not delegate that responsibility to the Mayor.¹⁷⁶

¹⁷⁴ 2A McQUILLIN, MUN. CORP., §10.40.10, pp. 439-440 (citing *Metropolitan Water Dist. Of Southern California v. Whitsett*, 215 Cal. 400 (1932)). The Council may delegate to others the power and obligation to execute or administer policy. "The rule, forbidding the delegation of legislative authority, does not preclude the appointment of officers, agents or employees for the performance of administrative and executive duties in making effective the legislative will, for example, in carrying out the police power. It does not deprive a municipality of power to appoint agents to make contracts, and an ordinance may delegate to administrative officers the power to determine when its provisions are being disobeyed. ¶ . . . An ordinance that leaves to an executive officer the definition of things to which that ordinance applies when the definition is not commonly known may be an unwarranted and invalid delegation of legislative power to an executive officer."

¹⁷⁵ 2A McQUILLIN, MUN. CORP., § 10.42, p. 448 (citing, *inter alia*, *Oakland v. Carpentier*, 13 Cal. 540 (1859); *Pearson v. Washington*, 439 S.W. 2d 756 (Mo.) (1969) (delegation of powers of mayor and council to city administrator invalid); *Domar Elec., Inc. v. City of Los Angeles*, 9 Cal. 4th 161 (1994).

¹⁷⁶ RHYNE, MUNICIPAL EXECUTIVE, §11.4, p. 79, "A governmental body charged with the responsibilities of establishing a particular officer's or employee's duties and to supervise their performance, generally may not delegate this power to the mayor." McQuillin describes an "autocratic mayor" form of government, where all executive and administrative power is given to the Mayor, and where the Council exercises legislative powers only. In large Eastern cities, the mayor has unrestricted power of appointment and more or less unrestricted power of removal of heads of administrative departments. McQuillin notes that giving the mayor such unrestricted power represents "a firmer administrative unity by concentrating all the executive power of the city in him or her." McQuillin analyzes this form of government as follows:

In truth, it is much like the step taken by the Roman Empire in the days of Diocletian (284-305) and of Constantine (323-337) in placing all military and administrative power in the hands of the emperor to ward off the barbarian hosts. It was an endowment of the head of the government with sacred attributes. The consolidation of all executive and administrative power in the mayor, it is argued, gives more efficiency to government. If efficiency is the sole test of city government, all that is needed is to elect one individual because centralized government with a dictator is the most efficient and thorough. 2A McQUILLIN, MUN. CORP., § 9.18, pp. 211-214.

P. Epilogue.

The City Manager's request for opinion¹⁷⁷ highlights important legal concerns which the Mayor has had when attempting to exercise executive authority in an area where the Council appears to have a similar claim of authority. The City Manager's request made evident the need to provide further guidance as to the extent (and limits) of the relative powers of the City Manager, Mayor and Council in the area of executive and administrative affairs. The City Manager's concerns are legitimate. His thoughtful summary of the "executive authority" legal issues arising under the current form of government, and our review of our opinions addressing those issues, led to the broad discussion in this opinion in these key respects: (i) at first blush, The Charter does appear to give a broad grant of executive authority to the Mayor; (ii) none of our previous opinions and memoranda discussed how our previous form-of-government analyses fit within general "form of government" principles of municipal law; and (iii) a popular understanding of the Executive Power at the state and federal level suggests broader (or more general, or even inherent) executive powers in the office of Mayor.

In our previous opinions and memoranda, we endeavored to capture the factual basis and legislative intent which attended the transition to the current form of government. In a series of subsequent opinions and memoranda, we addressed implementation, and specific issues and disputes concerning competing and shared authority. In this opinion, we surveyed sources of local executive law for the light they shed on our own form of government. What remains is to address how the analysis in this opinion responds to the City Manager's other related questions.

A portion of the City Manager's request concerns contracting authorities. The City Manager specifically asks that our opinion provide "some specific focus on how [the Mayor's executive] powers may relate to contracting authorities." As the City Manager explains in his request,

My experience in government is that contracting authorities within budgeted limitations are generally within the ambits of an Executive Power. If that general rule were applied in Fresno, then except to the extent there is express conflicting authorities granted by the Charter over those matters in favor of the Council, contract authorities do not exist in favor of the Council.

As discussed above,¹⁷⁸ the Mayor has no inherent power to contract. Whatever power the Mayor has to contract must be expressly stated in the Charter or in an

¹⁷⁷ See, Attachment 1 and footnote 7, *supra*.

¹⁷⁸ Section G (Power to contract).

ordinance.¹⁷⁹ If the Mayor is given contract authority under the terms of an ordinance, the Mayor exercises that authority pursuant to the contract power which The Charter initially vested in the Council, but which the Council delegated to the Mayor.¹⁸⁰

The City Manager also asked why previous City Attorney opinions have:

operated under the opinion that “[u]nder the Charter, the Council is the ultimate manifestation of the client.” The basis for that conclusion is stated to be the rule of professional conduct which states that “the client is the organization itself, acting through its highest authorized officer.” What is not stated is why it is presumed that the Council is the highest authorized officer in all matters. Such a rule of operation effectively ignores the authorities granted to the Mayor under the first sentence of § 400. ¶ When relating to contracts that may fall within the ambit of Executive Authorities, it appears that the Mayor may be the “highest authorized officer” and that he or she would, therefore, be the ultimate manifestation of the client.

As our analysis has shown,¹⁸¹ the Council is the general agent and principal of the City in matters of governance. Thus, the Council will *generally* be the highest authorized officer in matters relating to local governance, including exercise of the contract authority.¹⁸²

In those relatively few cases where the Mayor is expressly (or by necessary implication) vested with executive authority by The Charter (e.g., authority to hire the City Manager), the Mayor is the highest authorized officer.¹⁸³ Likewise, if for example, a federal statute required execution by the chief executive officer, the Mayor would be such

¹⁷⁹ See generally, discussion in Section N (The limitations of the “Separation of Powers” Doctrine).

¹⁸⁰ Section “O” (The Council may delegate administrative and executive powers not otherwise vested in the Mayor or City Manager).

¹⁸¹ Section L (The Charter vests the general powers of local governance in the Council as the City’s legislative and governing body).

¹⁸² Section G (Power to contract) and Section L (The Charter vests the general powers of local governance in the Council as the City’s legislative and governing body).

¹⁸³ See, for example Section H (The Mayor possesses enumerated appointment powers), Section I (The Mayor’s power to veto, seek reconsideration, recommend the budget, and recommend legislation), and Section J (The Mayor has substantial authority in the preparation of the City budget).

officer. However, if a City Manager sued the Mayor and “City” for breach of employment contract, or some constitutional or civil rights violation arising out of the

employment relationship, then an analysis of the background facts may conclude that the Council is the “highest authorized” officer, because the Charter empowers the Council to control the City’s legal business¹⁸⁴ and the Government Claims Act¹⁸⁵ authorizes Council to provide defense counsel and provide indemnity (including settlement at City expense).

In summary, our analysis concerning the reference to the Mayor in Charter § 400 (as the City’s “Chief Executive” vested with the “executive power” of the City),¹⁸⁶ also serves to explain the general principles of municipal law that govern an analysis of local “executive power” issues. The City Manager’s request for opinion also allowed us to systematically summarize our previous analyses in a way that we hope assists the Mayor, City Manager, and Council to address and resolve future questions arising from our unique form of government.

Approved:

/s/

HILDA CANTÚ MONTROY
City Attorney

/s/

JESSE J. AVILA
Assistant City Attorney

Attachment 1: City Manager Memorandum to City Attorney, et al, Re: Executive Authorities of the Mayor (August 3, 1999)

c: Mayor
Council
City Clerk

JJA:dlv,prn:rsi:pn(execauth - 16a) January 10, 2003 (2:43PM)

¹⁸⁴ Section G, pp. 31-32.

¹⁸⁵ Cal. Gov’t Code § 825.

¹⁸⁶ Section D.



City Manager's Office


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CITY ATTORNEY

DATE: August 3, 1999

TO: HILDA MONTTOY, City Attorney
JESSE AVILA, Assistant City Attorney

FROM: JEFFREY M. REID,  City Manager

SUBJECT: EXECUTIVE AUTHORITIES OF THE MAYOR

The purpose of this memorandum is to follow-up on the conversation recently held with Mr. Avila regarding my request for a survey of law governing the appropriate limits of the Executive Authorities of the Mayor. I fear that this request will undoubtedly carry some political ramifications. However, my purpose is to seek to avoid future political controversies by having some rules and analysis better defined outside the context of a then present policy dispute.

The focus of my discussion with Mr. Avila concerned my perception of ethical conflicts of interest regarding your offices attempt to jointly represent the RDA and the City's administrative staff on contract matters. However, I also expressed my concern regarding the more general issue that too often opinions regarding authorities of the Mayor are sought from and determined by your office in the context of a then existing policy dispute that I fear tends to color the nature of the advice provided.

I expressed the belief that a broader survey of the field of law governing the limits of Executive Powers would be helpful. In response I was provided copies your office's June, 1996 summary and Transition Recommendations, and a February 1997 memorandum concerning Practical Questions Under the Mayor-Council Form of Government. Those opinions, however, do not address my specific inquiry.

The Charter expressly states that "The executive power of the City shall be vested in the office of the Mayor." I believe we would benefit from a memorandum that includes a survey of relevant law that explains what constitutes "Executive Powers" as referenced in the first sentence of Charter Section 400. The grant of executive powers to the Mayor carries with it, by implication, limitation on the Council's authorities. Specifically, those authorities that constitute an executive power would be included in the exceptions to general Council authorities stated in the first sentence of Section 500. The legal analysis forwarded from your office does not address that general grant of authorities to the Mayor. The opinions instead focus on the provisions that detail specific authorities of the Mayor or conclusions regarding the general authorities reserved on behalf of the Council. You have, however, determined certain implicit authorities for the Mayor concerning Executive Orders.

Attachment #1 to Opn 2000-01

(1/2)

August 3, 1999

Page 2

My experience in government is that contracting authorities within budgeted limitations are generally within the ambits of an Executive Power. If that general rule were applied in Fresno, then except to the extent there is express conflicting authorities granted by the Charter over those matters in favor of the Council, contract authorities do not exist in favor of the Council. Charter Section 1208 does, by implication, suggest Council authorities in the award of contracts governed by that Section. However, Section 1208 deals only with contracts involving an expenditure of City moneys of more than Twenty-Seven Thousand Dollars (\$27,000) for materials, supplies, equipment or for public works construction. Service contracts or contracts relating to the expenditure of appropriated grant monies are not within the ambit of that Section.

In addition to the contracting authorities, the broader question is what powers and authorities the Council has to engage in "administrative" authorities that would generally be viewed as falling into the ambit of an "Executive Powers" matter. This inquiry is not related to the administrative matters that would be encompassed in a request for information or staff direction to provide information necessary for legislative activities. Your opinion of February 1997 provided sufficient information on that subject. Instead, this relates to the authorities of the Council to issue certifications of compliance to other governmental entities, and any other such administrative or ministerial authorities.

The opinions and operations of your office have generally operated under the opinion that "Under the Charter, the Council is the ultimate manifestation of the client." The basis for that conclusion is stated to be the rule of professional conduct which states that "the client is the organization itself, acting through its highest authorized officer." What is not stated is why it is presumed that the Council is the highest authorized officer in all matters. Such a rule of operation effectively ignores the authorities granted to the Mayor under the first sentence of Section 400.

When relating to contracts that may fall within the ambit of Executive Authorities, it appears that the Mayor may be the "highest authorized officer" and that he or she would therefore be the ultimate manifestation of the client. In those instances, the City Attorneys Office, in handling matters that relate to an adverse party who is not the same "highest authorized officer" would appear to have an ethical conflict of interest that, at a minimum would require a waiver based on the kinds of informed consent that the private sector counsel would be required to provide.

Therefore, I request; (1) a survey of the legal authorities that define and limit "Executive Powers" in the context of the kinds of activities in which a municipal government engages; (2) some specific focus on how those powers may relate to contracting authorities; (3) how those authorities may serve to define or limit Council authorities in the realm of other administrative affairs; (4) how those authorities could serve to create the status for the Mayor as the "highest authorized officer" in certain activities; and (5) whether your offices have any potential conflicts when jointly advising the RDA and City administrative staff on contracting matters in light of the separate nature of their governing authorities.